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OUR FEDERALISM, OUR HAZARDOUS WASTE, AND OUR GOOD FORTUNE

ADAM BABICH*

Fate, the saying goes, looks after fools, drunkards, and the United States. One manifestation of this phenomenon is the evolution of "Our Federalism"¹ from a vague limitation on the reach of national power into a promising tool for enforcing environmental laws against some of this country's most persistent polluters: federal agencies and state and local governments.²

* Adam Babich, J.D., 1983, Yale Law School, is Editor in Chief of *ELR—The Environmental Law Reporter* and Adjunct Professor at the Georgetown University Law Center. *ELR* is published by the Environmental Law Institute, a nonprofit, nonpartisan, public-interest organization dedicated to improving environmental law through research, dialogue, and education. In private practice from 1988-92, Babich represented citizen groups, municipalities, and members of the regulated community on environmental issues. Before that, he litigated hazardous waste cases for the Colorado Department of Law and clerked for Justice Jean E. Dubofsky of the Colorado Supreme Court.

1. *Younger v. Harris*, 401 U.S. 37, 44-45 (1971) ("It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.").

2. This Article focuses primarily on environmental cooperative federalism. In addition to its uses in the field of environmental protection, however, federalism serves several important purposes:

Four principal values . . . support preservation of the federal system. A dual system of government checks abuses of power in any branch of the system. State and local governments increase the opportunities for citizens to participate actively in the democratic process and create diverse cultural and political environments. Finally, the distribution of power among fifty-one different governments enhances opportunities for innovation and experimentation.

Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 10 (1988).

Most of the "checks" on federal power referred to above, however, do not actually limit that power, but probably do encourage restraint.

[S]tate and local governments check federal authority by regulating areas that the federal government chooses to ignore. . . .

....

Most importantly, states check national power by serving as a wellspring of political force. Political parties that are out of power on the federal level can maintain their constituencies in the states. When the time comes to challenge the dominant national party, these challengers gather strength from their state organizations. At the same time, individuals representing new interests can organize more easily on the state level, building lobbies that may someday be powerful enough to sway national politics. In these ways, state governments help maintain the multiparty system and prevent the growth of a monolithic political power on the federal level.

Id. at 5-7 (footnotes omitted).

If asked to design an ideal system of government, few people's first impulse would be to create a big sovereign whose jurisdiction overlapped that of many little sovereigns.³ Even those sold on the checks and balances created by separating the legislative, executive, and judicial branches of government might balk at establishing over fifty such three-part structures to govern one nation.⁴ But like much of the Constitution, modern federalism can function in ways that appear to reflect subtle genius. Given the apparent frustration of the framers' original hopes for the doctrine, however, federalism's continuing vitality must be chalked up largely to good fortune.⁵

This Article focuses primarily on federalism's impact on government programs that regulate hazardous-waste management and cleanup. First, it provides background discussions of the problems posed by hazardous waste⁶ and of federalism's origins. It next addresses environmental cooperative federalism, discussing five principles of cooperative federalism in the context of two laws that follow

3. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 908 (1994) ("We have a federal system because we began with a federal system We began with a federal system because of some now uninteresting details of eighteenth century British colonial administration. . . . and we proclaim its virtues out of the universal desire for self-justification.").

4. There are, of course, more sovereigns than 50, since many Indian tribes have retained their sovereignty. See generally David F. Coursen, *Tribes as States: Indian Tribal Authority to Regulate and Enforce Federal Environmental Laws and Regulations*, 23 ENVTL. L. REP. (ENVTL. L. INST.) 10,579 (Oct. 1993) (describing the treatment of Indian lands under environmental statutes). Generally, when "Congress clearly indicates that Indian tribes are subject to a given law, no tribal sovereignty exists to bar the reach or enforcement of that law." *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1096 (8th Cir. 1989). States, however, do not have jurisdiction "over Indians [on] Indian [lands] unless Congress has clearly expressed an intention to permit it." *Washington Dep't of Ecology v. EPA*, 752 F.2d 1465, 1469-70 (9th Cir. 1985) (holding that the Resource Conservation and Recovery Act (RCRA) does not authorize states to regulate Indians on Indian lands, but expressing no opinion about whether a state could create a RCRA program regulating non-Indians on Indian lands). This Article, however, will focus on issues involving the federal government's relationship with states, rather than tribes.

5. See THE WORKING GROUP ON FEDERALISM OF THE DOMESTIC POLICY COUNCIL, *THE STATUS OF FEDERALISM IN AMERICA 2* (1986) [hereinafter REAGAN WORKING GROUP REPORT] (decrying that "the Framers' vision of a limited national government of enumerated powers has gradually given way to a national government with virtually unlimited power to direct the public policy choices of the States in almost any area").

6. The term "hazardous waste" is commonly used in three ways: (1) as a catch-all phrase encompassing the various substances subject to the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993), and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (1988 & Supp. V 1993); (2) to refer to materials that meet the regulatory definition of hazardous waste applicable to RCRA's Subtitle C regulatory program (codified at 40 C.F.R. pt. 261 (1994)); and (3) to refer to materials that meet RCRA's statutory definition of hazardous waste. 40 U.S.C. § 6903(5) (1988).

very different approaches to the federal/state partnership: The Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)⁷ and the Resource Conservation and Recovery Act (RCRA).⁸ The Article highlights some of the failures of cooperative federalism in the hazardous waste field. It concludes, however, that the doctrine earns its keep by providing a potentially effective structure for enforcing hazardous-waste laws against government-owned or operated facilities.

I. OUR HAZARDOUS WASTE

A. *Regulation and Cleanup*

Hazardous waste is a powerful symbol of the need for environmental protection. Disasters like those at Bhopal⁹ and Chernobyl,¹⁰ and incidents like those at Love Canal¹¹ and Times Beach¹² raised legitimate concerns about public exposure to invisible poisons. These concerns, however, have arguably been blown out of proportion as movies and television programs reinforced a popular conception that exposure to hazardous waste is one of the worst fates that one might suffer.¹³ Important aspects of Superfund and RCRA seem geared

7. 42 U.S.C. §§ 9601-9675.

8. 42 U.S.C. §§ 6901-6992k.

9. See E. Donald Elliott & E. Michael Thomas, *Chemicals*, in SUSTAINABLE ENVIRONMENTAL LAW 1265 (Celia Campbell-Mohn et al. eds., 1993). ("In 1984, an accidental release of methyl isocyanate from a chemical plant owned by Union Carbide near Bhopal, India, resulted in thousands of injuries and deaths.").

10. See Dan W. Reicher, *Nuclear Energy and Weapons*, in SUSTAINABLE ENVIRONMENTAL LAW, *supra* note 9, at 905 ("The worst accident in the history of nuclear power at the Chernobyl reactor in the Soviet Union . . . spread large quantities of radiation over the Ukraine, Byelorussian and Russian Republics, and westward into Europe.").

11. See Elliott & Thomas, *supra* note 9, at 1265 (the federal government purchased homes and evacuated the area because of seepage of toxic chemicals at the Love Canal disposal site in upstate New York).

12. See Wayne Biddle, *Toxic Chemicals Imperil Flooded Town in Missouri*, N.Y. TIMES, Dec. 16, 1982, at A17 (describing dioxin contamination at Times Beach, Missouri).

13. The reality, of course, is much more complicated. Most people are routinely exposed to potentially toxic and carcinogenic substances as they gas up their cars, clean their houses, refinish their furniture, and engage in countless other day-to-day activities. Because sciences such as toxicology and epidemiology are still in relatively early stages of development, the significance to public health of many of these low-level exposures is unknown. Although scientists regularly conduct risk assessments and provide precise-sounding risk quantifications, such as "5 x 10⁻⁴," they base these assessments on assumptions that are rooted as much in policy decisions as in science. See PAUL A. LOCKE, ENVTL. L. INST., RES. BRIEF NO. 4, REORIENTING RISK ASSESSMENT 7-8 (1994). Indeed, scientific uncertainty about these issues is so profound that nobody really knows whether typical risk assessments tend to over or understate risk. See Howard Latin, *Good Science, Bad Regulation, and Toxic Risk Assessment*, 5 YALE J. ON REG. 89, 91-92 (1988).

more to responding to these popular fears than reducing actual risks.¹⁴

For lawyers, "hazardous waste" and "hazardous substances" are terms of art that say more about the legal status of chemicals than about the dangers those chemicals present. Under RCRA, the U.S. Environmental Protection Agency (EPA) imposes stringent and expensive regulation on management of subtitle C hazardous wastes.¹⁵ But, for seemingly arbitrary reasons,¹⁶ EPA exempts equally dangerous chemicals from the system and regulates others hardly at all.¹⁷

14. See *infra* notes 16-17 and accompanying text. Indeed, several years ago EPA announced that its spending on hazardous waste problems is disproportionate to other known risks (such as those posed by air pollution, ozone depletion, and pesticide residues in food), due in part to the pressure of public opinion. U.S. ENVTL. PROTECTION AGENCY, UNFINISHED BUSINESS: A COMPARATIVE ASSESSMENT OF ENVIRONMENTAL PROBLEMS—OVERVIEW REPORT xv, 95, 96 (Feb. 1987); see also STEVEN BREYER, BREAKING THE VICIOUS CIRCLE 49 (1993) (noting that "[r]egulatory bodies . . . are politically responsive institutions Their agendas, within limits, respond to the public's demands. Their choices of default assumptions, to a degree, can respond to [various constituents' desires] to appear especially careful to err on the safe side or alternatively to show sensitivity to economic costs").

15. 40 C.F.R. pt. 261 (1994).

16. For example, the same chemical that is defined as hazardous waste if trucked to a municipal treatment plant, will be exempt if disposed of at the same treatment plant via a sewer system that also carries domestic sewage. 40 C.F.R. § 261.4(a)(1)(ii); see EPA Administered Permit Programs; the National Pollutant Discharge Elimination System; General Pretreatment Regulations for Existing and New Sources; Regulations to Enhance Control of Toxic Pollutant and Hazardous Waste Discharges to Publicly Owned Treatment Works [POTWs], 55 Fed. Reg. 30,082, 30,082 (1990) (pmb.) ("The exclusion . . . covers industrial wastes discharged to POTW sewers containing domestic sewage, even if these wastes would be considered hazardous if disposed of by other means."); *Comite Pro Rescate de la Salud v. Puerto Rico Aqueduct & Sewer Auth.*, 888 F.2d 180, 188 (1st Cir. 1990), cert. denied, 494 U.S. 1029 (1990). Industrial users of public treatment plants, however, must provide regulators with notice of wastes sent to the plants that would have been hazardous wastes "if otherwise disposed of." 40 C.F.R. § 403.12(p)(1). Similarly, a chemical that is defined as hazardous waste when it is a discarded commercial product might not meet the definition if produced as a byproduct of an industrial process. 40 C.F.R. § 261.33(d) (cmt.); see RICHARD C. FORTUNA & DAVID J. LENNETT, HAZARDOUS WASTE REGULATION: THE NEW ERA 32-35 (1986).

17. For example, EPA has noted:

RCRA's implementing regulations for the management of hazardous wastes do not apply to hazardous wastes derived from households. It has been shown, nevertheless, that even the small quantities of hazardous waste discarded or discharged from households can collectively be of sufficient toxicity and volume in municipal landfills and sewers to pose serious hazards to human health and the environment.

....

EPA recognizes that a variety of common household commodities contain toxic pollutants, including acids, bases, metals, and complex organic compounds, including aliphatic and aromatic hydrocarbons, and chlorinated organic solvents. U.S. ENVTL. PROTECTION AGENCY, PUB. NO. 21W-4004, NATIONAL PRETREATMENT PROGRAM: REPORT TO CONGRESS, 3-53 (1991) [hereinafter EPA PRETREATMENT REPORT]. Indeed, EPA has acknowledged that, although municipal solid waste landfills (MSWLFs) are much less

This regime may allow government representatives to tell the public that hazardous wastes are carefully regulated, but only because Congress and EPA have defined the term "hazardous waste" to exclude many potentially dangerous materials.

Although broader and more flexible than RCRA subtitle C, the Superfund program for cleanup of "hazardous substances"¹⁸ is now notorious for fostering too much litigation and too little actual cleanup.¹⁹ Superfund's dramatic success in addressing imminent hazards²⁰ has been overshadowed by misguided attempts to restore

stringently regulated than most hazardous waste facilities, "data available to [EPA] . . . do not provide strong support for distinguishing the health and environmental threats posed by MSWLFs and Subtitle C facilities." Solid Waste Disposal Facility Criteria, 56 Fed. Reg. 50,978, 50,982 (Oct. 9, 1991) (pmb.) [hereinafter Solid Waste Preamble].

Solid waste (*i.e.*, garbage, which is not regulated by RCRA Subtitle C) is often indistinguishable from subtitle C hazardous waste unless you know where the wastes came from. Solid waste can contain lead and other heavy metals, solvents, pesticides, radioactive materials, and other substances that easily qualify as toxic. *See, e.g.*, 40 C.F.R. § 261.4(a), (b) (exempting certain mining wastes, pulping liquors, spent sulfuric acid, spent wood preserving solutions, household waste, waste from coal combustion, wastes associated with oil exploration, development, or production, cement kiln dust waste, etc.). *See generally* John C. Dernbach, *Industrial Waste: Saving the Worst for Last?*, 20 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,283 (July 1990). Superfund's definition of "hazardous substances" picks up some but not all material that is exempt from RCRA Subtitle C. 42 U.S.C. § 9601(14).

18. 42 U.S.C. § 9601 (14) (defining the term). Superfund authorizes the government to take action, *inter alia*, "[w]hensoever any hazardous substance is released or there is a substantial threat of such a release into the environment." *Id.* § 9604(a)(1). The government determines the nature of its response on a site-by-site basis. *See infra* note 82 and accompanying text.

19. *See* JAMES M. McELFISH, JR. & JOHN PENDERGRASS, *REAUTHORIZING SUPERFUND: LESSONS FROM THE STATES*, ENVTL. L. INST., RES. BRIEF NO. 2, 3-4 (1993) (summarizing complaints about the Superfund program). But the authors of a Brookings Institution and Resources for the Future study recently noted:

[D]espite a great deal of rhetoric to the contrary, the cleanup of the 1,134 nonfederal sites currently on EPA's National Priorities List will not impose an overwhelmingly large financial burden on many industries . . .

[T]he current Superfund program pales in comparison to other federal environmental regulatory programs in terms of annual economic impact. According to our estimates, annual spending in the United States pursuant to Superfund is about \$6 billion, including expenditures by all parts of the federal government and all spending by private parties for cleanup, Superfund taxes, and transaction costs. This \$6 billion represents less than 5 percent of the \$135 billion spent in the United States each year to comply with all federal environmental regulations.

KATHERINE N. PROBST ET AL., *FOOTING THE BILL FOR SUPERFUND CLEANUPS: WHO PAYS AND How?* 9-11 (1995).

20. For example, drum farms—like the one that exploded in Elizabeth, New Jersey in 1980 and threatened the population of New York City—are no longer quite such a common sight. *See 25 Years of Headlines*, ENVTL. F., Nov./Dec. 1994, at 56, 58. J. William Futrell has argued that Superfund's "emergency response program is one of the great environmental achievements of the last decade" and that "Superfund launched and continues to further a revolution in corporate board rooms" leading to pollution prevention and waste

contaminated sites to almost pristine conditions.²¹ Meanwhile, other sites—which present dangers that are not immediate enough to qualify for “removal action”²² and score too low on EPA’s hazard ranking system for “remedial action”²³—receive essentially no federal attention under Superfund, even if they pose risks in excess of the Agency’s “acceptable” range.²⁴

The result under both RCRA and Superfund, is that society spends a disproportionate amount of resources addressing a relatively limited selection of the risks posed by toxic materials.²⁵ Despite these

minimization. J. William Futrell, *Superfund and Reactionary Rhetoric*, ENVTL. F., Jan./Feb. 1994, at 56.

21. Under Superfund,

[T]he EPA reacted to unrealistic congressional goals by spending huge amounts of money while attempting to meet cleanup standards that varied inexplicably from site to site. Apparently accepting the congressional assumption that current technology was adequate to the job, the EPA mandated expensive application of unproven groundwater-cleanup techniques to contaminated sites across the nation. Despite the essentially experimental nature of this undertaking, the agency failed to require the careful review and documentation that would have been part of a conscious effort to advance cleanup technology. As a result—aside from the under-heralded “removal” program, under which the EPA takes quick action to abate immediate risks—the EPA spent so much for so little under Superfund that, by 1994, the program threatened the credibility of the entire environmental movement.

Adam Babich, *What Next?*, ENVTL. F., Nov./Dec. 1994, at 48, 50.

22. See 40 C.F.R. § 300.415 (setting forth the factors to consider in determining whether a removal action under the National Contingency Plan (NCP)—the regulations that implement Superfund—is appropriate). Removal actions generally address relatively immediate risks. *Id.*

23. Remedial actions are designed to provide long-term protection. 42 U.S.C. § 9601(24). To be eligible for federally financed remedial action, a site must be listed on EPA’s National Priorities List (NPL). 40 C.F.R. § 300.425(b)(1). EPA may list a site on the NPL if it scores sufficiently high on EPA’s Hazard Ranking System. *Id.* § 300(c)(1).

24. See 40 C.F.R. § 300.430(e)(2)(i)(A)(2) (“For known or suspected carcinogens, acceptable exposure levels are generally concentration levels that represent an excess upper bound lifetime cancer risk to an individual of between 10⁻⁴ and 10⁻⁶ . . .”); National Oil and Hazardous Substances Pollution Contingency Plan, Final Rule, 55 Fed. Reg. 8666, 8715-18 (1990) (pmbl.) (describing EPA’s acceptable risk range); see also *Ohio v. EPA*, 997 F.2d 1520, 1533-34 (D.C. Cir. 1993) (upholding and explaining EPA’s risk range).

25. RCRA regulates Subtitle C hazardous wastes with a stringency that might be impractical if the program applied more equally to all dangerous waste. See *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 363 (D.C. Cir. 1989) (per curiam), cert. denied, 498 U.S. 849 (1990) (noting that RCRA allows EPA to require treatment of Subtitle C hazardous waste to levels below drinking water standards because although “EPA must consider costs in setting [drinking water standards] there is no similar limitation in § 3004 of RCRA”).

E. Donald Elliott has noted:

[T]he true price for the misallocation of our scarce environmental resources is paid not only in dollars but also in other environmental problems left unaddressed [O]ur effort is “an inch wide and a mile deep”—focusing on relatively few substances that we regulate very heavily

problems, however, both statutes have dramatically improved environmental protection.²⁶

A. Governmental Polluters

The most dangerous hazardous waste sites in the United States generally are those that the federal government created itself.²⁷ During the Manhattan Project and the cold war that followed, the federal government and its various contractors built a vast infrastructure across the United States for manufacture and storage of nuclear and chemical weapons.²⁸ This weapons production "came at a price that few . . . could have anticipated": pervasive environmental contamination.²⁹ Some sites continue to pose risks of explosion and nuclear

E. Donald Elliott, *Environmental TQM: Anatomy of a Pollution Control Program that Works!*, 92 MICH. L. REV. 1840, 1847 (1994) (book review); see also Babich, *supra* note 21, at 54 ("Regardless of whether disparate treatment of similar risks is the result of political influence or simple inertia, it is wasteful, destructive, and—ultimately—threatens the credibility of the environmental regulatory system.").

26. See David Chittick, *Soundbite*, ENVTL. F., Nov./Dec. 1994, at 51 ("It's difficult to understand how far we have come unless we look back 20 or 30 years. . . . Chemicals of all types were put into the ground . . . without any knowledge as to the long-term effects."). Superfund and RCRA have been particularly successful in terms of the incentives they create for waste minimization and voluntary cleanup. See Adam Babich, *Understanding the New Era in Environmental Law*, 41 S.C. L. REV. 733, 755-58 (1990). Additionally, they allow the government to respond quickly to situations that pose risks to public health or the environment, such as toxic materials stored in poorly maintained lagoons or drum farms. See, e.g., 42 U.S.C. § 6973; *id.* § 9606.

27. See *Colorado v. United States Dep't of Army*, 707 F. Supp. 1562, 1570 (D. Colo. 1989) (calling the Defense Department's Rocky Mountain Arsenal "the worst hazardous and toxic waste site in America"); COUNCIL ON THE DEP'T OF ENERGY'S NUCLEAR WEAPONS COMPLEX, TIDES FOUND., *FACING REALITY: NUCLEAR WEAPONS "CLEANUP"* 3 (1995) [hereinafter *FACING REALITY*] ("In terms of the quantity and virulence of its wastes, the [U.S. Department of Energy (DOE)] legacy is in a class of its own . . .").

28. See OFFICE OF ENVTL. MGT., U.S. DEP'T OF ENERGY, *CLOSING THE CIRCLE ON THE SPLITTING OF THE ATOM 2* (1995) [hereinafter *CLOSING THE CIRCLE*] ("Some idea of the scale of this [nuclear weapons production] enterprise can be understood from the cost: from the Manhattan Project to the present, the United States spent over 300 billion dollars on nuclear weapons . . ."); RICHARD RHODES, *THE MAKING OF THE ATOMIC BOMB* 601-05 (1986) (describing the scope of the Manhattan Project); Vicky L. Peters et al., *Can States Enforce RCRA at Superfund Sites? The Rocky Mountain Arsenal Decision*, 23 ENVTL. L. REP. (Envtl. L. Inst.) 10,419, 10,419 (July 1993) ("The Army used the 27 square mile [Rocky Mountain Arsenal] site to make chemical and incendiary weapons, including mustard gas, white phosphorous, phosgene, and napalm."); Dan W. Reicher & Jason Salzman, *One Hundred Billion Dollars and Counting* . . . , ENVTL. F., Jan./Feb. 1989, at 15, 16 ("DOE's 17 major nuclear weapons research and production facilities are located in 13 states, employ about 90,000 people, and occupy an area twice the size of Delaware.").

29. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, *COMPLEX CLEANUP, THE ENVIRONMENTAL LEGACY OF NUCLEAR WEAPONS PRODUCTION* (1991). Indeed:

The past 45 years of nuclear weapons production have resulted in the release of vast quantities of hazardous chemicals and radionuclides to the environment. There is evidence that air, groundwater, surface water, sediments, and soil, as well

chain reaction.³⁰ The government exacerbated many of these problems throughout much of the 1980s by engaging in "[c]rude waste disposal practices that were banned in the private sector."³¹

as vegetation and wildlife, have been contaminated at most, if not all, of the Department of Energy (DOE) nuclear weapons sites.

Id. at 3; see also 1 OFFICE OF ENVTL. MANAGEMENT, U.S. DEP'T OF ENERGY, ESTIMATING THE COLD WAR MORTGAGE: THE 1995 BASELINE ENVIRONMENTAL MANAGEMENT REPORT iii (1995) ("In addition to creating an arsenal of nuclear weapons, the [nuclear weapons] complex left an unprecedented environmental legacy. . . . [including] an enormous backlog of waste and dangerous materials."). DOE has stated that:

problems posed by [the nuclear weapons complex] are unlike those associated with any other industry. They include unique radiation hazards, unprecedented volumes of contaminated water and soil, and a vast number of contaminated structures ranging from reactors to chemical plants . . . to evaporation ponds.

. . . The imperatives of the nuclear arms race . . . demanded that weapons production and testing, rather than waste management and the control of environmental contamination, be given the first priority.

CLOSING THE CIRCLE, *supra* note 28, at 4-5. See also Survey Finds DOE Plutonium Storage to Pose Risks to Environment, Workers, 25 Env't Rep. (BNA) 1618 (Dec. 16, 1994) ("The Energy Department's inventory of plutonium presents significant hazards to workers, the public, and environment, according to the conclusions of a draft survey of DOE facilities"); DOE says Weapons Plant Cleanups to Cost \$230 Billion, Take 75 Years, Daily Env't Rep. (BNA), Apr. 4, 1995, at A-7 (reporting that DOE believes that it will take a minimum of \$170 billion to take "minimum action" to stabilize nuclear weapons sites). According to the U.S. General Accounting Office, DOE faces the need to spend "perhaps as much as \$1 trillion" on cleaning up contamination at over 7000 sites. U.S. GENERAL ACCOUNTING OFFICE, GAO/RCED-95-1, REPORT TO THE SECRETARY OF ENERGY, DEPARTMENT OF ENERGY, NATIONAL PRIORITIES NEEDED FOR MEETING ENVIRONMENTAL AGREEMENTS 10 (1995) [hereinafter GAO PRIORITIES REPORT].

30. ADVISORY COMM. ON NUCLEAR FACILITY SAFETY TO THE SECRETARY OF ENERGY, FINAL REPORT ON DOE NUCLEAR FACILITIES 72-89, 152 (1991) (describing risk of explosion in radioactive-waste tanks at the DOE Hanford and Savannah River facilities and "nuclear criticality concerns" posed by plutonium in ducts at the Rocky Flats Plant); FACING REALITY, *supra* note 27, at 5 (listing examples of radioactive waste and contamination problems at nuclear weapons production sites); see, e.g., Public Serv. Co. of Colo. v. Andrus, 825 F. Supp. 1483, 1507 (D. Idaho 1993) ("The Office of Nuclear Safety . . . expressed significant concerns over the Underwater Fuel Storage Basin at the Idaho Chemical Processing Plant. In particular, the Office noted that conditions at that facility have degraded to such an extent that 'the potential for a criticality accident has increased significantly.'" (citation omitted); *Danger of Explosion at Hanford Concealed, DOE Still Understates Problem, Report Says*, 21 Env't Rep. (BNA) 657 (Aug. 3, 1990) ("A DOE report . . . acknowledged the risk of an explosion of more than a hundred tanks holding millions of gallons of highly radioactive sludge . . . left over from more than 40 years of nuclear weapons production."); *Radioactive Waste Tanks at Hanford Seriously Deteriorating, DOE Reports*, 23 Env't Rep. (BNA) 2836 (Feb. 26, 1993) (Tanks containing millions of gallons of radioactive waste at DOE Hanford Reservation may be leaking radioactive and chemical waste into soil and ground water. Moreover, a buildup of hydrogen makes some of the tanks vulnerable to explosion).

31. Matthew L. Wald, *Waste Dumping that U.S. Banned Went on at Its Own Atom Plants*, N.Y. TIMES, Dec. 8, 1988, at A1; see Adam Babich, *DOE's Promising First Step*, ENVTL. F., May/June 1995, at 10 (reviewing CLOSING THE CIRCLE, *supra* note 28, and summarizing DOE's compliance history).

States and their political subdivisions are also significant polluters, although their contribution to pollution problems is not as well documented as that of federal agencies.³² One significant problem is that RCRA and the Clean Water Act, working together, have the perverse effect of transforming toxic waste generated by private facilities into toxic discharges from municipal sewage treatment plants.³³ This is because EPA exempts the discharge of industrial waste through sewers to municipal treatment plants from regulation under both RCRA and the Clean Water Act's National Pollution Discharge Elimination System (NPDES).³⁴ These exemptions reduce the role of federal and state enforcement agencies, leaving the municipal operators of sewage treatment plants responsible for regulating industrial discharges of hazardous materials to municipal plants.³⁵ The system tends to break

32. States and municipalities, of course, engage in many of the same activities as private businesses. For example, many maintain fleets of vehicles, own and operate real property and storage tanks, and manage construction and demolition projects. States and local governments maintain streets and highways, hospitals, universities, airports, and other facilities that generate toxic materials. *See, e.g.*, TRANSPORTATION RESEARCH BOARD, NATIONAL RESEARCH COUNCIL, REP. NO. 351, HAZARDOUS WASTES IN HIGHWAY RIGHTS-OF-WAY 26-33 (1993) (noting various hazardous waste problems that state transportation departments face). Moreover, various states have

expressed the view, to some degree, that their [transportation department] employees had first acted as though, or assumed that, the fact of being a public agency and "sister" agency to the state environmental regulatory agency . . . would grant them some immunity from the environmental requirements applied to the private sector. Maintenance departments were quite often the first to be disabused of this notion when state regulatory agencies appeared at maintenance facilities to inspect underground storage tanks and the handling of hazardous materials at the facilities.

Id. at 26; *see also* NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, SETTING PRIORITIES, GETTING RESULTS: A NEW DIRECTION FOR EPA (Summary Report to Congress) 32 (1995) [hereinafter NAPA REPORT] (noting that often "local governments are a source of pollution, like industry; they operate sewage systems, landfills, incinerators, and other facilities that pollute").

33. *See* EPA PRETREATMENT REPORT, *supra* note 17, at 1-3 (municipal treatment plants must impose controls on businesses that discharge to sewers "to protect receiving water [and] also to ensure that sewage sludge is of sufficient quality for the disposal or beneficial use intended. Sewage sludge may be landfilled or incinerated, or, if it contains low enough quantities of toxic pollutants, it may be used as a fertilizer or soil conditioner.").

34. 40 C.F.R. § 261.4(a)(1)(ii) (RCRA exemption); 40 C.F.R. § 122.3(c) (NPDES exemption). The NPDES system is governed by 33 U.S.C. § 1342. Because of these exemptions

wastewater from POTWs [publicly owned treatment works] consists of domestic sewage and industrial and commercial wastes that are discharged indirectly to surface waters via sewers by industrial users of the POTWs. *There are hundreds of thousands of [such] industrial users in the United States.* Approximately 30,000 industrial users meet EPA's definition of "significant industrial user."

EPA PRETREATMENT REPORT, *supra* note 17, at 1-2 (emphasis added).

35. 40 C.F.R. § 403.8 (requiring pretreatment programs); *see* U.S. ENVT'L. PROTECTION AGENCY, INDUSTRIAL USER PERMITTING GUIDANCE MANUAL 1-3, 1-4 (1989) (publicly owned

down, largely because it is unrealistic to expect municipalities to enforce federal mandates aggressively against companies that make up a good part of the municipalities' tax and employment bases.³⁶ Industrial pollutants that pass through or interfere with municipal facilities,³⁷ however, can cause municipalities to violate their NPDES permits.³⁸ Moreover, the system can also result in releases from municipal plants of pollutants that EPA—or state permitting authorities—failed to anticipate when writing municipalities' NPDES permits.³⁹

Governmental sources of pollution—whether federal, state, or local—are generally more difficult to control than their privately owned analogues. This is because, by and large, environmental laws depend

treatment works "with approved pretreatment programs are required to issue industrial user permits or other authorized control mechanisms to their industrial users"); EPA PRE-TREATMENT REPORT, *supra* note 17, at 1-6 ("Local governments bear the primary responsibility for developing, carrying out, and enforcing local pretreatment programs."). In turn, the municipal plants generally discharge the waste to surface water and, thus, are governed by NPDES permits. 42 U.S.C. § 1311(a); EPA PRETREATMENT REPORT, *supra* note 17, at 1-2 (noting that each municipal treatment plant "that discharges directly to surface waters must apply for and obtain an NPDES permit"); *id.* at 1-4 (noting that such "NPDES permits . . . protect two media: receiving waters and sewage sludges").

36. EPA has found that "significant deficiencies in program implementation by [municipal treatment plants] are apparent, such as issuing inadequate permits . . . and failing to take effective enforcement actions." EPA PRETREATMENT REPORT, *supra* note 17, at 7-55. EPA studied three cities' pretreatment programs in about 1983. The study found that all three cities' "programs were deficient in . . . identification of industries, monitoring, permitting, and enforcement; this resulted in NPDES permit violations and documented environmental problems." *Id.* at 1-19. According to EPA, each major study that has been submitted to Congress about the pretreatment program has found that "improved enforcement" may be needed to meet environmental goals. *Id.* at 1-24; *see also* Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 ENVTL. L. 1549, 1570 (1991) (noting that local governments rarely "use their legal powers to protect the environment").

37. As EPA has stated:

Typically, [municipal treatment plants] receive a mixture of two types of waste: domestic sewage . . . and industrial wastewaters discharged into the sewer. Industrial wastes frequently contain toxic pollutants, such as heavy metals or manmade organic chemicals, that may not be compatible with the physical and biological processes that [such plants] typically use to treat wastes. Such toxic pollutants may pass through wastewater treatment plants untreated or interfere with treatment plant operations. Therefore, [treatment plants] may require industrial users to "pretreat" wastewaters discharged to municipal sewers.

EPA PRETREATMENT REPORT, *supra* note 17, at 1-4.

38. *See supra* note 35.

39. EPA has noted that "[f]ew [municipal treatment plant] NPDES permits contain limits for toxic pollutants." EPA PRETREATMENT REPORT, *supra* note 17, at 5-78. Additionally, the Second Circuit has held that a regulated entity may discharge pollutants with impunity if its NPDES permit fails to address them. *Atlantic States Legal Found. v. Eastman Kodak Co.*, 12 F.3d 353, 358 (2d Cir. 1993), *cert. denied*, 115 S. Ct. 62 (1994).

on effective enforcement to inspire compliance efforts. Unless the laws are enforced, the natural tendency of any regulated party is to put its resources into achieving its primary mission, whether that mission is to manufacture a product or to provide a governmental service such as police protection or national security.⁴⁰ By virtue of its sovereign status, the federal government has developed a number of subtle and not-so-subtle ways to stave off enforcement actions.⁴¹ In contrast, states and local governments are clearly vulnerable to federal enforcement. Nonetheless, enforcement actions against these entities can be politically sensitive.⁴²

II. OUR FEDERALISM

The Supreme Court has used the phrase "Our Federalism" to refer to "a proper respect for state functions . . . [and a] belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."⁴³ The Court stressed:

The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. . . . What the concept does represent is a system in

40. For example, in *CLOSING THE CIRCLE*, *supra* note 28, at 4-5, DOE asserts that the imperatives of the Cold War demanded that weapons production and testing be given priority over control of environmental contamination. Indeed, "[f]or more than 50 years, DOE and its predecessors focused on producing nuclear weapons, giving relatively low priority to managing waste, whether hazardous (toxic) or radioactive or both (mixed waste)." GAO PRIORITIES REPORT, *supra* note 29, at 11. To placate regulators and, thus, "stay in [weapons] production," DOE signed "unrealistic cleanup agreements at several sites," assuming that it could later revise impractical deadlines. *Id.* at 27-30. The resulting "[d]elays in meeting these commitments led regulators to . . . doubt DOE's credibility." *Id.* at 3.

41. When introducing a conference report regarding Superfund amendments to the Senate, one of its principal authors noted: "[N]o loophole, it seems, is too small to be found by the Federal Government." 132 CONG. REC. S14,903 (daily ed. Oct. 3, 1986) (remarks of Sen. Stafford). Indeed, in one of its most blatant attempts to shield federal polluters from independent oversight, EPA asserted the right in 1989 to exempt federal facilities from state enforcement by listing the facilities on the national priorities list. Listing Policy for Federal Facilities, 54 Fed. Reg. 10,520 (1989). But in *United States v. Colorado*, 990 F.2d 1565, 1583 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994), the court found that EPA's assertion of power to preempt state enforcement authority is "contrary to the plain language" of Superfund. See Adam Babich *Circumventing Environmental Laws: Does the Sovereign Have a License to Pollute?*, 6 NAT. RESOURCES & ENV'T, Summer 1991 (reviewing federal strategies for avoiding enforcement); see also *infra* notes 116-118 and accompanying text (describing the federal government's unitary-executive policy).

42. See Merritt, *supra* note 2, at 6-7 ("Some state and local governments have proven themselves formidable lobbyists and indefatigable litigants.")

43. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

which there is *sensitivity to the legitimate interests of both State and National Governments*, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interest, always *endeavors to do so in ways that will not unduly interfere* with the legitimate activities of the States.⁴⁴

This formulation arguably has been watered-down from the framers' original intent. Rather than asserting that the national government would display "sensitivity" and endeavor not to interfere "unduly" with the states, James Madison claimed that the powers delegated to the federal government "are few and defined. . . . [T]he powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the States."⁴⁵ Under Madison's interpretation, protection of public health and welfare would clearly fall within the province of the states.

Whatever the framers' intent,⁴⁶ the very document they drafted doomed from the beginning any dream of a national government

44. *Id.* (emphasis added).

45. THE FEDERALIST (James Madison), No. 45, at 292-93 (C. Rossiter ed., 1961); *see also id.*, No. 39, at 245 (asserting that the proposed government's very "jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects"); *id.* (Alexander Hamilton), No. 31, at 197 ("there is greater probability of encroachments by the members upon the federal head than by the federal head upon the members").

These statements, of course, were made in promoting a compromise that greatly expanded the role of the national government, compared with the clear primacy of the states under the Articles of Confederation. Samuel Adams argued that "the Idea of Sovereignty in the States must be lost" if the compromise were adopted. Letter from Samuel Adams to Richard Henry Lee (Dec. 3, 1787), *reprinted in* 4 THE WRITINGS OF SAMUEL ADAMS 324 (Harry A. Cushing ed., 1908). To allay fears that a national government would spell the end of state sovereignty, proponents of the Constitution made assurances that the First Congress would consider a Bill of Rights, including the Tenth Amendment, to explicitly reserve nondelegated powers to the states or the people. *United States v. Darby*, 312 U.S. 100, 124 (1941). *See generally* STANLEY ELKINS & ERIC MCKITTRICK, THE AGE OF FEDERALISM 59-61 (1993). But the Tenth Amendment "is essentially a tautology." *New York v. United States*, 112 S. Ct. 2408, 2418 (1992). There is "nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment." *Darby*, 312 U.S. at 124.

46. *See* H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1526-31 (1987) (book review) ("The founders simply did not agree on which came first, nation or states, or on the locus of 'sovereignty,' whatever that might be. . . . They did not agree, in fact, on a great many important questions about federal power and state autonomy and no amount of reinterpretation or rearrangement of the evidence can make them do so.") (footnote omitted).

with sharply limited powers. For one thing, the framers enumerated federal powers "in language broad enough to allow for the expansion of the Federal Government's role."⁴⁷ For another, the Constitution's command that federal law "be the supreme law of the Land"⁴⁸ more or less predetermined the legal outcome of any power struggle between the federal government and the states.⁴⁹ Most importantly, the framers embedded into the Constitution a great evil—slavery—the lingering effects of which would require the full breadth of the commerce power to battle.⁵⁰

47. *New York v. United States*, 112 S. Ct. at 2418-19; see U.S. CONST. art. I, § 8 (authorizing Congress to, *inter alia*, "pay the Debts and provide for the . . . general Welfare . . . regulate Commerce . . . among the several States . . . [and] make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers").

Complaints like those in the REAGAN WORKING GROUP REPORT, *supra* note 5, at 43, that the Court has altered the framers' design, ultimately ignore the plain language of the Constitution. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985) ("With rare exceptions . . . the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace."). In the final analysis, it is that plain language, not the advocacy documents known as the *Federalist Papers*, that should guide the Court's interpretation. See Raoul Berger, *The Ninth Amendment, as Perceived by Randy Barnett*, 88 Nw. U. L. REV. 1508, 1509 (1994) (urging traditional analysis of the Constitution's text because "the Constitution is a legal document") (citation omitted).

48. U.S. CONST. art. VI, § 2 ("[A]nd all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .").

49. *New York v. United States*, 112 S. Ct. at 2419 ("[T]he Supremacy Clause gives the Federal Government 'a decided advantage in th[e] delicate balance' the Constitution strikes between State and Federal power.") (citation omitted).

50. See ROBERT M. COVER, *JUSTICE ACCUSED* (1975). Article IV, § 2 reads:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

U.S. CONST. art. IV, § 2; see also art. I, § 9 (prohibiting Congress from ending the African slave trade before 1808); *Prigg v. Pennsylvania*, 41 U.S. 539 (1842) (upholding a fugitive slave law).

It is no accident that some of the Court's most expansive readings of the commerce power came in the context of federal efforts to battle racism. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding that Congress may regulate conduct at a local restaurant that serves food which has moved in interstate commerce under the 1964 Civil Rights Act). Indeed, if the Court had denied the federal government the tools to grapple with the stain of slavery, it is questionable whether what remained—however consistent in its details with the framers' intentions—would have been worthy of the bold experiment in democracy that the Constitution represents.

Earlier high points in the Court's expansive reading of the commerce power came in cases like *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding federal regulation of home-grown, home-consumed wheat), in response to problems posed by the Depression. Indeed, Bruce Ackerman argues that it was only after the New Deal that "the federal government would operate as a truly national government, speaking for the People on all matters that sufficiently attracted the interest of lawmakers in Washington, D.C." BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 105 (1991).

Yet, while the federal government apparently now has the *power* to displace most state regulation, this has not meant the destruction of state sovereignty.⁵¹ As noted by the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*,⁵² the "built-in restraints that our system provides through state participation in federal governmental action" provide for a continued role for state sovereignty in the federal system.⁵³ Although it recently supplemented those restraints in *Lopez v. United States*,⁵⁴ to date the Court has left it largely up to Con-

51. Court decisions defining the extent of federal power have "traveled an unsteady path." *New York v. United States*, 112 S. Ct. at 2420. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), which had held that the Tenth Amendment barred Congress from making federal minimum wage overtime laws applicable to state and municipal employees. *Usery* had overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968), which, like *Garcia*, sustained the validity of extending federal wage laws to public employees. Dissenting in *Garcia*, Justice Rehnquist expressed his confidence that the holding of *Usery* would "in time again command the support of a majority of this Court." 469 U.S. at 580 (Rehnquist, J., dissenting).

52. 469 U.S. 528 (1985).

53. *Id.* at 528, 550, 556. The Court noted that each state is equally represented in the Senate and plays a role in selecting the President and members of the legislative branch. The Court explained that: "Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." *Id.* at 550-51.

54. 115 S. Ct. 1624 (1995). In *Lopez*, the Court held unconstitutional the Gun-Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A) (1988 & Supp. V 1993). The Court explained that "the possession of a gun in a local school zone is in no sense an *economic activity* that might, through repetition elsewhere, have . . . a *substantial effect* on interstate commerce." *Id.* at 1634 (emphasis added).

The *Lopez* Court identified "three broad categories of activity that Congress may regulate under its commerce power," (1) "the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and (3) "activities having a substantial relation to interstate commerce." *Id.* at 1629-30. As recognized by Justice Thomas in his concurrence, however, the third of these categories "if taken to its logical extreme, would give Congress a 'police power' over all aspects of American life," which is exactly the result a majority of the Court wished to avoid. *Id.* at 1642 (Thomas, J., concurring).

Reasoning that the Constitution's enumeration of powers must "presuppose something not enumerated" and that there must be some "distinction between what is truly national and what is truly local," the Court drew a line between "commercial" and "non-commercial" activity. The Court acknowledged the vagueness of this distinction, admitting that the question of "whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty." *Id.* at 1633. Moreover, the Court's opinion might be read as suggesting that Congress may regulate "noncommercial" activity under the commerce power if it provides for "a case-by-case [factual] inquiry" into "the requisite nexus [of the violator's conduct] with interstate commerce." *Id.* at 1631 (citation omitted).

In dissent, Justice Breyer criticized the Court for believing that "the Constitution would distinguish between two local activities, each of which has an identical effect upon interstate commerce, if one, but not the other, is 'commercial' in nature." Moreover, Jus-

tice Breyer pointed out that Congress "could rationally conclude that schools fall on the commercial side of the line." *Id.* at 1664 (Breyer, J., dissenting). The majority's most telling response was that Justice Breyer's analysis would leave one "unable to identify any activity that the States may regulate but Congress may not." *Id.* at 1632.

Justice Kennedy, joined by Justice O'Connor in concurrence, identified the root of the problem: "the transition from the economic system the Founders knew to the single, national market still emergent in our own era." *Id.* at 1634 (Kennedy, J., concurring). Justice Kennedy, however, accepted the commercial/noncommercial distinction, stating that "Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy." *Id.* at 1637. Because the votes of both Justices Kennedy and O'Connor were crucial to the result in *Lopez*, Kennedy's concurring opinion may prove important to the evolution of the Court's new view of the commerce power.

Justice Kennedy focused on (1) the fact that "education is a traditional concern of the States" and (2) the assertion that a federal intrusion into areas of traditional state concern would interfere with government accountability. If, he claimed, "the Federal Government [were] to take over the regulation of entire [noncommercial] areas of traditional state concern . . . the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." Justice Kennedy stressed that the Gun-Free School Zones Act would have "foreclose[d] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise . . . by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term." *Id.* at 1641.

Justice Kennedy's accountability analysis echoes Justice O'Connor's majority opinion in *New York v. United States*, 112 S. Ct. 2408, 2424 (1992). But in *New York v. United States* the focus on accountability made sense. That case involved a congressional attempt to regulate indirectly by "compel[ling] States to regulate." *Id.* In contrast, *Lopez* concerned Congress's straightforward and direct prohibition of conduct it deemed dangerous. The defendant was charged with a federal crime, indicted by a federal grand jury, and convicted in federal court. In *Lopez*, therefore, Congress acted "in full view of the public, and . . . federal officials [would] suffer the consequences if the decision turns out to be detrimental or unpopular." *New York v. United States*, 112 S. Ct. at 2424.

Perhaps to reassure those who—like Justice Souter—fear "a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago," *Lopez*, 115 S. Ct. at 1654 (Souter, J., dissenting), Justice Kennedy noted that history "counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power." Thus, "*stare decisis* operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature." *Id.* at 1637 (Kennedy, J., concurring) (emphasis added).

How will *Lopez* affect federal regulation of the environment? It is too soon to tell. Clearly protection of the public's health and welfare is a traditional state function. Presumably, therefore, federal intrusion into environmental protection raises "accountability" concerns for Justices Kennedy and O'Connor. Just as clearly, however, most hazardous waste management activity is closely tied to commercial activity. But questions remain. For example, is it within the commerce power for Congress to authorize EPA take action on private property to protect children from dangerous levels of heavy metals in residential (or school) soils? See Superfund § 104, 42 U.S.C. § 9604. Will congressional attempts to "reform" state tort law qualify as "commercial" regulation? See Anthony Lewis, *Back to the Future?*, N.Y. TIMES, Apr. 28, 1995, at A33 (noting that "[f]ederalization of tort law is an example" of conservative demands for "[f]ederal action in all kinds of areas traditionally left to the states"); see also Philip H. Corboy, *Steamrolling Tort Reform*, LEGAL TIMES, Mar. 27, 1995, at 22 (arguing that "H.R. 956, the so-called Common Sense Product Liability and

gress to define the respective roles of the federal and state governments.⁵⁵ Thus, federalism and state sovereignty are changeable concepts. For example, as of this writing, many legislators who, in other contexts, extol the virtues of state autonomy, have pledged to federalize the tort law of the several states.⁵⁶

III. COOPERATIVE FEDERALISM

The "built-in restraints"⁵⁷ protecting the states' primacy in their traditional domains are reflected in Congress's practice of pursuing environmental protection⁵⁸—at least under most modern antipollution laws—through "program[s] of 'cooperative federalism'" which "offer States the choice of regulating . . . according to federal standards or having state law pre-empted by federal regulation."⁵⁹ The

Legal Reform Act of 1995, is notable for its complete disregard for principles of federalism"). The Court's decision could also call into question the constitutionality of Superfund § 309, 42 U.S.C. § 9658, which tolls state statutes of limitations for toxic torts until "the date the plaintiff knew (or reasonably should have known) that the . . . damages were caused or contributed to by the hazardous substance or pollutant or contaminant concerned."

Certainly the Court has announced a test that will be difficult to apply logically and consistently over time. Only time will tell whether *Lopez* will be seen, to quote Justice Souter's dissent, "as only a misstep, its reasoning and its suggestions not quite in gear with the prevailing standard." Justice Souter, however, went on to warn: "Not every epochal case has come in epochal trappings." *Lopez*, 115 S. Ct. at 1657 (Souter, J., dissenting).

55. Nonetheless, the federal government cannot "'commandeer[] the legislative processes of the States.'" *New York v. United States*, 112 S. Ct. at 2420 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)). Thus, Congress "may not compel the States to enact or administer a federal regulatory program." *New York v. United States*, 112 S. Ct. at 2435. In *New York v. United States*, the Court found that a law that required states to either regulate according to Congress's directions or take title to waste generated within their borders "crossed the line distinguishing encouragement from coercion," and that Congress had no authority "to impose either option as a freestanding requirement". *Id.* at 2428. Moreover, although the state had initially agreed to enactment of the statute at issue, state officials "cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution." *Id.* at 2432.

56. House Republican Conference, *Legislative Digest*, Sept. 27, 1994, at 38 (containing the "Contract with America"); see Corboy, *supra* note 54.

57. See *supra* text accompanying note 53.

58. Environmental law "began as a creature of state law [and] continues to have a strong state focus even after several decades of federal activism and legislation." James M. McElfish Jr., *State Environmental Law and Programs* § 6.01[1], in 1 *LAW OF ENVIRONMENTAL PROTECTION* 6-4 (Sheldon M. Novick, Environmental Law Inst. eds., 1994).

59. *New York v. United States*, 112 S. Ct. at 2412; see also Mark Squillace, *Cooperative Federalism Under the Surface Mining Control and Reclamation Act: Is This Any Way to Run a Government?*, 15 *Envl. L. Rep. (Envl. L. Inst.)* 10,039, 10,039 (Feb. 1985) ("One of the hallmarks of the environmental legislation passed by Congress in the 1970s was its increased reliance on a regulatory framework that has come to be known as cooperative federalism. . . . To varying degrees, virtually all of the major regulatory laws in the environmental field employ this scheme.").

Supreme Court described Congress's first use of environmental cooperative federalism in the Clean Air Act Amendments of 1970 as Congress "taking a stick to the States."⁶⁰ That stick (the threat of preemption), however, usually is accompanied by a carrot—federal funding for qualifying state antipollution programs.⁶¹ Although Congress and EPA occasionally have attempted to command that states develop and implement regulatory programs,⁶² cooperative federalism, in general, is based on federal *incentives* for state regulation.⁶³

Cooperative federalism holds the promise of allowing the states continued primacy and flexibility in their traditional realms of protecting public health and welfare, while ensuring that protections for all citizens meet minimum federal standards. In theory, the system

60. *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 64 (1975) (noting that Congress acted in frustration over states' disappointing response to federal concerns about air pollution). Arguably, modern cooperative federalism was not practical before the late 1960s because

it was unclear whether the federal government could constitutionally operate air and water pollution programs. The expansion of the commerce clause in support of the federal regulatory power was a long process and was not completed until the Civil Rights Act of 1964. . . . The Supreme Court's vindication of [that Act] opened the door for sweeping environmental health and safety regulation.

J. William Futrell, *The History of Environmental Law*, in *SUSTAINABLE ENVIRONMENTAL LAW*, *supra* note 9, at 38 (footnote omitted). Tracing the evolution of federal environmental laws from 1948 until the early 1970s, Futrell argues that Congress "steadily shifted power to the federal government," resulting in a "creeping federalization" of environmental law. *Id.*

61. *E.g.*, 42 U.S.C. § 7405 (authorizing EPA grants for support of air pollution planning and control programs).

62. See Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1204-05 (1977). In 1973, EPA published regulations that purported to require that states adopt statutes and regulations to implement programs to control automobile emissions pursuant to the Clean Air Act. Three circuit courts issued opinions overturning the regulations, and one circuit court issued an opinion upholding them. In *EPA v. Brown*, 431 U.S. 99 (1977) (*per curiam*), the Supreme Court vacated the three decisions adverse to EPA, after the Agency agreed to modify the regulations. *Id.* at 1204 n.45.

It is not uncommon for Congress to enact laws that *appear* to require states to assume regulatory burdens. See Nicholas J. Johnson, *EPCRA's Collision with Federalism*, 27 IND. L. REV. 549 (1994) (asserting that Congress, in the Emergency Planning and Community Right-to-Know Act, issued a flat command that states regulate). But in most or all of these cases, it is doubtful that the courts would take Congress's language literally as attempts to commandeer the states' legislative processes. See *New York v. United States*, 112 S. Ct. at 2425 ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.") (citation omitted).

63. There are "a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests." For example, Congress may impose conditions on receipt of federal funds so long as the conditions "bear some relationship to the purpose" of the spending. *New York v. United States*, 112 S. Ct. at 2412.

allows states to experiment and innovate, but not to sacrifice public health and welfare in a bidding war to attract industry.⁶⁴

Some have asserted that federalism in this context is nothing more than decentralization—a device for using the states as regional functionaries of federal authority.⁶⁵ But the concept of state sovereignty, however vague, makes a crucial difference. It enhances the states' ability to function independently, in part due to the power it lends to the rhetoric of state politicians.⁶⁶ It also contributes to the states' legal ability to maintain independence, as the U.S. Department of Justice's (DOJ's) "unitary executive" policy⁶⁷ amply demonstrates.

64. One commentator has explained:

A strong, unified regulatory system at the national level can ensure that environmental concerns are not forgotten as local communities compete for economic benefits. Funding on a national scale can help provide adequate environmental controls in areas that otherwise could not afford them. Consistency in environmental regulation throughout a nation can provide a predictable, stable environment in which industry can function.

On the other hand . . . [d]ecentralized decisionmaking is flexible and can respond to local concerns and conditions.

J. William Futrell, *The Administration of Environmental Law*, in SUSTAINABLE ENVIRONMENTAL LAW, *supra* note 9, at 118; see also Stewart, *supra* note 62, at 1210-12 (describing the advantages of a decentralized system for creating appropriate local regulatory control, but also suggesting that federally imposed standards would prevent states from abandoning the environment in favor of economic development).

Professor Richard L. Revesz has argued that "there is no support in the theoretical literature on interjurisdictional competition for the claim that, without federal intervention, there will be a race to the bottom [by states] over environmental standards." Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1233 (1992). As an environmental litigator from 1984-1993 and a state enforcement lawyer from 1984-1987, however, I saw states respond repeatedly to arguments by members of the regulated community that standards needed to be reduced to attract economic development or to prevent companies from moving to other jurisdictions. See *Dispute over Air Permit Regulations Leads to Proposal in Regulatory Bill*, Daily Env't Rep. (BNA), Apr. 27, 1995, at AA-1, AA-3 (reporting that U.S. Justice Department officials believe that "a strong federal presence [is] needed in environmental enforcement because [they] are concerned about large companies—which sometimes are the largest employers in a state—from exercising undue influence on state agencies to get favorable interpretations"). Professor Revesz's analysis may demonstrate limitations of "the theoretical literature on interjurisdictional competition," but it does not call into serious question the need for federal standards to provide a minimum level of environmental protection to all U.S. residents.

Minimum federal standards also help "prevent states or cities from victimizing their neighbors" by releasing pollutants that cross political boundaries. NAPA REPORT, *supra* note 32, at 2.

65. See Rubin & Feeley, *supra* note 3, at 908.

66. See Robert Pear, *Source of State Power is Pulled from Ashes*, N.Y. TIMES (nat'l ed.), Apr. 16, 1995, at 16 (reporting that the Tenth Amendment is "a political rallying cry [and] a source of political inspiration").

67. The "unitary executive" policy prevents federal enforcement agencies from enforcing the law effectively against other federal agencies. See *infra* notes 116-118 and accompa-

IV. FEDERALISM AND HAZARDOUS WASTE

As illustrated below—primarily through the examples of Superfund and RCRA—Congress and EPA must adhere to five basic principles for cooperative federalism schemes to work well. A program of cooperative federalism should: (1) provide for state implementation; (2) set clear standards; (3) reflect respect for state autonomy; (4) provide mechanisms to police the process; and (5) apply the same rules to government and private parties. But even when Congress and EPA have ignored many of these principles—as they have under Superfund and RCRA—cooperative federalism can improve the regulatory system.

A. *Providing for State Implementation*

The essence of cooperative federalism is that states take primary responsibility for implementing federal standards, while retaining the freedom to apply their own, more stringent standards.⁶⁸ Even when constrained by the need to meet minimum federal standards, every permitting or cleanup decision involves countless judgment calls. How agencies use their discretion to resolve detailed implementation issues can have an enormous impact on whether the public will perceive the overall decision as successful. State regulators usually can be more responsive to the needs and concerns of affected citizens than federal agencies.⁶⁹

With an important exception, RCRA adopts a typical structure for allowing qualified states to implement federal environmental policy.⁷⁰ Under Superfund, however, EPA violated this most basic principle of

nying text. The policy does not affect state enforcement, however, since the sovereignty of the states prevents them from being considered part of the "unitary" executive.

68. See, e.g., RCRA § 3009, 42 U.S.C. § 6929.

69. See Stewart, *supra* note 62, at 1210; Adam Babich, *Coming to Grips with Toxic Waste: The Need for Cooperative Federalism in the Superfund Program*, 19 *Env't. L. Rep. (Env't. L. Inst.)* 10,009, 10,010 (Jan. 1989) (arguing that "relatively less rigid bureaucracies" of state and local governments are more able to find cost-effective responses).

70. Under RCRA, a state seeking to administer and enforce a hazardous waste regulatory program applies to EPA for approval. 42 U.S.C. § 6926(b); Requirements for Authorization of State Hazardous Waste Programs, 40 C.F.R. pt. 271. EPA must approve applications that conform to regulatory requirements designed to ensure that the programs are "equivalent to" and "consistent with" the federal program and provide "adequate" enforcement of compliance requirements. 42 U.S.C. § 6926(b); 40 C.F.R. § 271.4 to .19. Such state programs may be more stringent than federal law, but EPA may reject aspects of a program that have no basis in human health or environmental protection and effectively prohibit treatment, storage, or disposal of hazardous waste. 40 C.F.R. § 271.4(b). Also, states may not impose requirements that unreasonably impede free movement of hazardous wastes across state borders to lawful treatment, storage, or disposal facilities. *Id.* § 271.4(a).

cooperative federalism, failing for over a decade to acknowledge that *any* state could be trusted to direct the cleanup of released hazardous substances.⁷¹ As explained below, in the context of Superfund, EPA and Congress managed to turn cooperative federalism upside down, leaving EPA as the entity responsible for implementing state-promulgated standards.

On its face, Superfund contains the most flexible statutory provision for cooperative federalism of any environmental law. It allows—but does not require—the federal government to enter into agreements with states to “carry out actions authorized in this section.”⁷² The agreement “*may* cover a specific facility or specific facilities,” but presumably may also cover states as a whole.⁷³ For the first thirteen years of the Superfund program, however, EPA refused to delegate *any* remedy-selection decisions to states.⁷⁴ Apparently because Congress merely authorized EPA to delegate instead of requiring it to do so, the Agency saw no reason to relinquish any of its turf.⁷⁵ In 1993,

Once authorized, a state implements its programs “in lieu of the Federal program” and conducts it in accordance with federal regulations. *Id.* § 271.1(g). State action that is taken pursuant to an authorized hazardous waste program has “the same force and effect as action taken by [EPA].” 42 U.S.C. § 6926(d); *United States v. Colorado*, 990 F.2d 1565, 1569 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994).

RCRA is somewhat unique in that it sets management standards for “solid waste” that states and citizens, but *not* EPA, may enforce. *See* Solid Waste Preamble, *supra* note 17, at 50,979. These regulations implement 42 U.S.C. § 6945, which bans “open dumping” of solid waste. “Open dumping” includes *any* solid-waste management practice that violates EPA regulatory criteria for sanitary landfills. 42 U.S.C. § 6903(14).

71. Babich, *supra* note 69, at 10,009-10.

72. 42 U.S.C. § 9604(d)(1)(A).

73. *Id.* § 9604(d)(1)(B) (emphasis added).

74. It was not until 1994 that EPA reportedly began to delegate such authority to states. *State Will Oversee Superfund Cleanup*, Daily Env't Rep. (BNA), Mar. 22, 1994, at B-5 (“Oklahoma has been put in charge by EPA to clean up a former zinc processing site . . . as part of an overall plan by EPA to allow states to take over cleanups to prevent superfund listing or get the sites off the National Priorities List.”); *EPA Agrees to Defer Proposed NPL Site Cleanup to State of Idaho*, Daily Env't Rep. (BNA), Aug. 5, 1994, at A-11 (reporting that an agreement “to let the state of Idaho assume the lead role in the cleanup of a proposed National Priorities List mining waste site” is “the second of its kind nationally A similar agreement has been reached on an Oklahoma site.”).

EPA's failure to delegate, however, has not chilled all state action to protect citizens against released hazardous substances. Indeed, “[t]he federal Superfund Law has, since its enactment in 1980, inspired a great deal of imitation in the states.” McELFISH & PENDERGRASS, *supra* note 19, at 3. This state activity is contemplated in Superfund itself. *See* 42 U.S.C. 9614(a) (“Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.”).

75. As EPA first began to implement Superfund, the Agency's attempts to retain exclusive control of hazardous substance cleanups threatened to run roughshod over the concerns of state environmental agencies. States, therefore, attempted to control federal discretion by independently enforcing—and threatening to enforce—state standards at

the D.C. Circuit remanded a portion of the National Contingency Plan (NCP) to EPA because the Agency failed "to offer any reasoned explanation" of its refusal to delegate Superfund remedy-selection and enforcement authorities to states.⁷⁶

Because Congress required Superfund cleanups to meet both state and federal "applicable or relevant and appropriate requirements" (ARARs), EPA often finds itself administering state-promulgated standards.⁷⁷ Essentially all cooperative federalism programs allow states to set standards that surpass the federal minimum level of

Superfund sites. EPA, however, struck back, asserting the right to preempt state environmental laws in the 1985 NCP, 50 Fed. Reg. 47,912, 47,971, 47,973, despite Superfund's non-preemption provision. 42 U.S.C. § 9614(a). Several states appealed the 1985 NCP in an action that Congress ultimately mooted by amending Superfund in 1986. *Ohio v. EPA*, No. 86-1096 (D.C. Cir. 1986).

Congress, in the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, attempted to strike a balance. The law provides for some preemption of state regulatory authority by stating that "[n]o Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section." 42 U.S.C. § 9621(e)(1) (emphasis added). This preemption generally does not affect underlying substantive standards, however, since Superfund cleanups generally must attain "any promulgated standard . . . under a State environmental or facility siting law that is more stringent than any Federal standard . . . and that has been identified to the President by the State in a timely manner." 42 U.S.C. § 9621(d)(2)(A)(ii). Instead of a state enforcing its standard directly, through a permit requirement, EPA is supposed to incorporate the state standard into the federally enforced cleanup plan. *Id.*; *Ohio v. EPA*, 997 F.2d 1520, 1526-27 (D.C. Cir. 1993). *But see infra* note 78 and accompanying text.

Superfund provides that "[a] State may enforce any . . . State standard . . . to which the remedial action is required to conform under this chapter in the United States district court for the district in which the facility is located." 42 U.S.C. § 9621(e)(2). So far, however, the courts have essentially read this provision out of the statute. *Colorado v. Idarado Mining Co.*, 916 F.2d 1486 (10th Cir. 1990) (holding that § 9621(e)(2) did not authorize a district court to issue an injunction to enforce a state-selected remedial action plan), *cert. denied*, 499 U.S. 960 (1991). Nonetheless, states can continue to enforce state standards under authority of state law, at least under some circumstances. *See United States v. Colorado*, 990 F.2d 1565, 1578 (10th Cir. 1993) (allowing state enforcement of RCRA at a federal Superfund site), *cert. denied*, 114 S. Ct. 922 (1994).

76. *Ohio v. EPA*, 997 F.2d at 1542. The NCP contains the regulations governing Superfund cleanups. 40 C.F.R. pt. 300. It is ironic that EPA's refusal to delegate coincided with President Ronald Reagan's order that:

Executive departments and agencies shall be guided by the following fundamental federalism principles:

* * *

(e) In most areas of governmental concern, the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly. In Thomas Jefferson's words, the States are "the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies."

Exec. Order No. 12,612, § 2, 52 Fed. Reg. 41,685 (1987), 3 C.F.R. 252 (1988).

77. "Applicable" requirements address the specific circumstances found at the site; "relevant and appropriate" requirements address problems sufficiently similar to those en-

stringency. But, under most federal environmental laws, states that go beyond federal standards are directly responsible for administering their more stringent programs, and thus, for handling whatever practical or political problems arise. In contrast, Superfund relies on threats of financial burdens and waivers of state law to prevent states from imposing standards that EPA deems needlessly stringent.⁷⁸ This scheme has pitted EPA against the states in a continuing battle to control the stringency of Superfund cleanups.⁷⁹

B. Setting Clear Standards

Without clear, objective standards, a program of cooperative federalism cannot meet the goal of providing a minimum level of protection for the public and the environment. Minimum federal standards allow federal agencies to restrain state and local tendencies to risk public health and welfare on short-sighted attempts to provide an attractive climate for businesses. But, unless those standards are reasonably clear and objective, federal oversight of state programs will be arbitrary, ineffectual, or both. Although RCRA Subtitle C standards doubtless could be improved and simplified,⁸⁰ they are nonetheless capable of reasonably objective application.⁸¹ Under Superfund, however, EPA compounded its failure to delegate implementation by failing to set clear standards for cleanups.

Superfund cleanups are governed by EPA's NCP, which provides for remedy-selection decisions based on evaluation of nine criteria.⁸²

countered that their use is well-suited to the site. Natural Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.5.

78. 42 U.S.C. § 9604(c)(3) (states must pay at least 10% of certain remedial costs and assure future maintenance); *id.* § 9621(d)(2)(C) (to be applied, state standards that "could effectively result" in a statewide prohibition of land disposal must be of "general applicability," adopted on the basis of "relevant considerations," and the state must arrange for payment of the incremental cost of applying them); *id.* § 9621(d)(4) (state standards need not be applied if, *inter alia*, they are technically impracticable, the remedial action will attain an "equivalent" "standard of performance," or they have not been consistently applied); *id.* § 9621(f)(3)(B) (states seek review of a federal decision not to apply a state standard under a "not supported by substantial evidence" standard).

79. See Carolyn L. Buchholz, *Can a Jurisdictional Showdown Under Superfund Be Avoided?*, 19 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,327 (Aug. 1989) (discussing jurisdictional conflicts pitting EPA and DOJ against Colorado, Montana, and Maryland); see also *supra* note 75.

80. See, e.g., *supra* notes 16-17.

81. The standards governing RCRA's corrective action program—a remedial action program analogous to Superfund—are less clear than most RCRA Subtitle C regulations. Indeed, by and large, they have yet to be promulgated. To date, however, EPA generally has allowed states the necessary flexibility to implement the corrective action program effectively.

82. These criteria are: (1) overall protection of the public and environment; (2) compliance with ARARs; (3) long-term effectiveness; (4) reduction of toxicity, mobility or vol-

Although these criteria appear to provide a solid framework for site-by-site common-sense decision-making, EPA clearly did not design them to achieve consistent results. Instead, stakeholders—including states, local governments, potentially liable parties, and, ideally, potentially affected members of the surrounding community—negotiate with the Agency about a separate cleanup plan for each contaminated site. Thus, in its current design, the Superfund program cannot provide citizens with a minimum level of protection regardless of whether the federal government or the states administer it.⁸³

C. *Respecting State Autonomy*

For states to serve as credible implementers of environmental policy, federal oversight must be conducted in a way that affords state laws and institutions some degree of respect.⁸⁴ The Superfund program's ARARs process, under which EPA passes judgment on whether states relied on "relevant considerations" when promulgating standards that are more stringent than their federal counterparts, is inconsistent with this need for respect.⁸⁵ As explained below, Congress

ume through treatment; (5) short-term effectiveness and impact; (6) "implementability"; (7) cost; (8) acceptability to the affected state; and (9) acceptability to the community. 40 C.F.R. § 300.430(e)(9)(iii)(A)-(I).

83. See Douglas J. Sarno, *Risk and the New Rules of Decisionmaking: The Need for a Single Risk Target*, 24 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,402 (July 1994) (arguing for a single national risk target to assure adequate and consistent levels of protection in all communities). EPA's practice of developing separate standards for each affected community complicates the government's attempts to provide for environmental equity and justice.

84. The National Academy of Public Administration (NAPA) has recommended that EPA "reward good state performance with additional autonomy and flexibility." NAPA REPORT, *supra* note 32, at 34. NAPA endorsed the idea of "differential oversight" to "match EPA's intervention in the state to the state's success in achieving desired results." *Id.* at 29. NAPA explains that:

[for] states with the best programs, the most responsible businesses, the most satisfied constituencies, and the best environmental results . . . EPA would be able to forgo review of routine permits entirely, reduce state reporting required under the grants, and allow the states considerable latitude in deciding how best to allocate EPA grant funds among problems and activities. . . .

States, and by extension their businesses, whose performance is lacking . . . would be subjected to additional oversight and EPA control. . . . EPA would treat states in the middle of the list accordingly, granting more or less discretion to particular programs or industries as deserved.

Id. at 29-30. EPA appears to be moving toward implementing NAPA's suggestions. *State-EPA Accord Dramatically Scales Back Federal Oversight*, INSIDE E.P.A. WEEKLY REPORT (Special Report), June 5, 1995, at 1 (reprinting a proposal by EPA and some state officials for a "National Environmental Performance Partnership System" that contemplates, *inter alia*, differential oversight).

85. See *supra* note 78 and accompanying text.

displayed a similar lack of respect for state autonomy in the way that it handled changes to the requirements of the federal RCRA program.

EPA constantly supplements and changes environmental regulations and Congress occasionally changes the statutes. Sovereign states, therefore, require a reasonable period of time for their legislators and agencies to make necessary conforming changes. Moreover, EPA needs additional time to approve the state changes as "consistent" with the federal program.⁸⁶ Thus, there will be a necessary lag between adoption of federal policies, and the implementation of those policies by states. Most environmental programs, including those portions of RCRA enacted before its amendment in 1984, provide for a reasonable grace period to allow for continued state implementation.⁸⁷

In 1984, however, Congress became unwilling to accept the inevitable delays associated with cooperative federalism. Thus, when enacting the Hazardous and Solid Waste Amendments of 1984 (HSWA),⁸⁸ it created an exception to the authority of EPA-authorized states to regulate in lieu of the federal government. As amended, RCRA requires that each HSWA requirement, and each regulation that implements such a requirement, take effect on the same date in every state.⁸⁹ Pending EPA's approval of each state's incorporation of each such requirement into its program, RCRA requires EPA to implement it directly.⁹⁰

As a result, a state can essentially never achieve primacy in RCRA implementation⁹¹ and RCRA implementation has become incredibly confusing.⁹² Cooperative federalism under RCRA, therefore, has be-

86. See *supra* note 70 for a discussion of EPA's approval process for state plans.

87. See 40 C.F.R. § 271.21(e)(1), (2). During this grace period, changes to the federal program do not take effect in authorized states. *Id.* Accordingly, the effective dates of RCRA regulations—including additions to lists of regulated substances—can vary geographically depending on the authorization status of particular states. See Aaron H. Goldberg, *The Federal Hazardous Waste Program: A House of Cards?*, 26 *Env't Rep. (BNA)* 365, 366 (1995).

88. Pub. L. No. 98-616, 98 Stat. 3221 (1984).

89. 42 U.S.C. § 6926(g)(1).

90. *Id.*; 40 C.F.R. § 271.3(b)(3).

91. Because EPA has yet to promulgate several required HSWA regulations, state programs are unlikely to catch up with federal requirements any time soon. (For example, presently EPA has yet to issue final regulations fully implementing HSWA's corrective action requirements.) Thus, in most states, EPA continues to receive applications for RCRA permits and enforce some HSWA-based RCRA regulations. 40 C.F.R. § 271.19(f).

92. Rather than treating all RCRA regulatory changes the same, RCRA, as amended, applies a special rule to statutory provisions added by HSWA and to regulations that implement HSWA. EPA, however, continues to change RCRA regulations in ways unrelated to HSWA. See, e.g., *New Mexico v. Watkins*, 969 F.2d 1122, 1132-33 (D.C. Cir. 1992) (holding

come an irritant to the regulated community, that—depending on the applicable state—may or may not be justified by the state's willingness to apply greater flexibility to implementation. For states, RCRA's co-operative federalism program is part of a pattern of complexity that has generally prevented them from attempting significant innovations.⁹³

D. Policing the Process

Federal regulators should not expect to agree with every decision made by their counterparts in state government. But allowing states to ignore minimum substantive and procedural standards would endanger the credibility of the regulatory system. For cooperative federalism to be effective, the states' commitments to implement federal standards must be enforceable.

Because delegation under Superfund has been so limited,⁹⁴ policing state compliance with minimum federal standards has not been a

that EPA made a "regulatory change" through a 1986 notice that interpreted pre-HSWA RCRA provisions). And for such non-HSWA regulatory changes, states still have a grace period within which to adopt federal changes. Thus, the existence of a grace period (during which a regulatory change may go unimplemented), and the identity of the regulator that will implement the change, depends not on when EPA promulgates the change but, instead, on when Congress amended RCRA to provide authority for it. Fortunately, when promulgating RCRA regulations, EPA makes a point of discussing implementation and effective dates in its Federal Register preambles to the regulations. See, e.g., Hazardous Waste Management Systems; Identification and Listing of Hazardous Waste; Toxicity Characteristics Revisions, 55 Fed. Reg. 11,798 (1990) (modifying the toxicity characteristic of RCRA's Subchapter III definition of hazardous waste pursuant to HSWA).

Moreover, states do not need, and rarely await, EPA authorization to enforce state law. See 42 U.S.C. § 6929; 40 C.F.R. § 271.1(i); McElfish, *supra* note 58, § 6.01[1], at 6-3 (observing that "the federal statutory overlay does not 'empower' the states Rather it enlists the states to exercise their inherent authority.") (footnote omitted). And there usually will be delays between states' adoption of regulations to conform to HSWA-based requirements, submission of applications to EPA for authority to implement the regulations, and EPA's grant of approval. EPA and the states may thus enforce separate versions of essentially the same requirements while authorization is pending. In such situations, unwary regulated entities that meet the requirements of only one sovereign may miss important deadlines enforced by the other.

93. Indeed, some states "simply incorporate the federal rules by reference." Hazardous Waste Management System; Definition of Hazardous Waste; "Mixture" and "Derived-From" Rules, 57 Fed. Reg. 7628, 7630 (1992) [hereinafter *Mixture Rule Interim Promulgation*]; cf. James M. McElfish Jr., *Minimal Stringency: Abdication of State Innovation*, 25 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,003 (Jan. 1995) (noting that "[m]any states have turned the floors that federal environmental mandates establish into ceilings").

94. Although it has generally refused to delegate remedy-selection authority, EPA has delegated other responsibilities to the states using a variety of types of agreements. U.S. ENVTL. PROTECTION AGENCY, PUB. NO. 9375.6-08C, AN ANALYSIS OF STATE SUPERFUND PROGRAMS, 50-STATE STUDY, 1993 UPDATE 13-14 (1993) (prepared by the Environmental Law Institute) [hereinafter *ELI 50-STATE STUDY*].

significant issue. In general, however, Superfund allows EPA discretion to set forth the terms of delegation in the provisions of the contract or cooperative agreement that provides for it.⁹⁵ If the state fails to comply, the federal government may sue "to enforce the contract or to recover any funds advanced or any costs incurred because of the breach."⁹⁶ Moreover, Superfund provides states with a powerful incentive to follow federal law: It authorizes only states that follow the NCP to recover their response costs from responsible parties.⁹⁷

In contrast, RCRA has a relatively elaborate mechanism for policing state compliance. EPA actively oversees state implementation and requires that states afford it unrestricted access to information.⁹⁸ If a state program changes or is interpreted or implemented in a way that fails to meet minimum federal requirements, EPA may withdraw its authorization.⁹⁹ EPA reviews, and may terminate, state permits and may suspend or revoke interim status.¹⁰⁰ Moreover, RCRA allows EPA to comment on draft state RCRA permits and then, if the state does not respond to EPA's satisfaction, enforce certain comments as if they were permit conditions.¹⁰¹ EPA may also issue compliance orders or bring enforcement actions in states with authorized programs after providing notice to the applicable state.¹⁰²

95. 42 U.S.C. § 9604(d)(1)(B).

96. *Id.* § 9604(d)(2).

97. *Id.* § 9607(a)(1)-(4)(A).

98. 40 C.F.R. § 271.17(a) (1994).

99. 42 U.S.C. § 6926(e); 40 C.F.R. § 271.22. Although EPA has authority to withdraw the authorization of states with programs that fail to meet federal standards, the Agency is understandably hesitant to do so. See *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390 (D.C. Cir. 1991) (upholding EPA's decision not to withdraw North Carolina's RCRA program). Such a withdrawal would be politically difficult. Perhaps more importantly, it would require EPA to hire staff and identify funding to administer the program itself. Thus, for example, when the State of New Mexico refused until 1989 to make changes to its state hazardous waste program to conform to a 1986 change to the minimum standards of the federal program, EPA did not exercise its authority to withdraw New Mexico's authorization. See *New Mexico v. Watkins*, 969 F.2d 1122, 1128-29 (D.C. Cir. 1992); see also NAPA REPORT, *supra* note 32, at 27 ("As a practical matter, EPA's ability to retake control of delegated state programs is tightly constrained by resources and political pressures.").

100. 42 U.S.C. § 6928(h)(2); 40 C.F.R. § 271.19(e).

101. 40 C.F.R. § 271.19(b), (e)(2). States also generally must "provide at least 30 days for public comment on all proposed settlements of [RCRA] civil enforcement actions." *Id.* § 271.16(d)(2)(iii).

102. 42 U.S.C. § 6928(a)(2). When EPA enforces provisions of programs that have been delegated to a state, however, EPA enforces the state provision itself, since that provision applies "in lieu of" federal law. 42 U.S.C. § 6926(b).

As noted in note 70, *supra*, however, Congress failed to grant EPA specific authority to enforce RCRA § 4005, 42 U.S.C. § 6945, which governs management of domestic waste and other garbage. See *Solid Waste Preamble*, *supra* note 17, at 50,979. But, RCRA § 4005 *does*

Like most federal antipollution laws, RCRA relies on citizen suit provisions to supplement EPA enforcement. By providing a federal cause of action to enforce minimum standards—even in states with authorized programs—RCRA citizen suit provisions empower members of the public to police the cooperative federalism process and supplement state enforcement efforts.¹⁰³ Opportunities for citizen enforcement thus help ensure that state-implemented environmental programs continue to meet minimum federal standards. In contrast, Superfund citizen suits have generally proven impractical because of Congress's poorly thought-out decision to remove challenges to most federal actions under Superfund from the jurisdiction of federal courts.¹⁰⁴

Recently, under the Clean Air Act, Congress improved the utility of citizen suits in policing the process of cooperative federalism. As amended in 1990, that Act allows citizens who believe that a state has issued an illegal permit to petition EPA to veto that permit. If EPA fails to do so within sixty days of the petition, the citizen has a right to appeal EPA's decision, and thus has an opportunity to recover reasonable costs and fees.¹⁰⁵ By providing citizens with a realistic chance to challenge state-issued permits, this provision greatly enhances the bar-

provide for citizen suit enforcement and—under RCRA § 7002, 42 U.S.C. § 6972, “any person” may bring a citizen suit. Moreover, in the 1992 Federal Facilities Compliance Act, *infra* note 120, Congress added federal agencies to RCRA's definition of “person,” 42 U.S.C. § 6903(15). Thus, EPA now has the option of filing citizen suits to protect the public and the environment from violations of solid waste criteria.

103. See Adam Babich, *Is RCRA Enforceable by Citizen Suit in States with Authorized Hazardous Waste Programs?*, 23 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,536 (Sept. 1993) (arguing that RCRA § 3006(a), 42 U.S.C. § 6926(a)—which allows EPA-authorized states to regulate hazardous waste “in lieu of” the EPA Subtitle C program—does not preclude citizen suits concerning violations of such programs under RCRA § 7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(A)); see also 49 *Fed. Reg.* 48,300, 48,304 (1984) (“[I]t is EPA's position that the citizen suit provision of RCRA is available to all citizens whether or not a state is authorized”); 45 *Fed. Reg.* 85,016, 85,020-21 (1980) (“any person, whether in an authorized or unauthorized State, may sue to enforce compliance with statutory and regulatory standards”).

104. 42 U.S.C. § 9613(h); see *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325 (9th Cir. 1995) (holding that citizen suits that challenge elements of an ongoing Superfund cleanup are barred). See generally Babich, *supra* note 21, at 54 (“[B]ecause [Superfund] insulates EPA decisions from review, it provides no incentives for the agency to pay real attention to public comment. One can hardly expect overworked government officials to give much credence to the opinions of people who have no meaningful ability to challenge their decisions.”); Deoohn Ferris, *Communities of Color and Hazardous Waste Cleanup: Expanding Public Participation in the Federal Superfund Program*, 21 *FORDHAM URB. L.J.* 671, 685 (1994) (“Congress should amend the Superfund statute to allow community groups to enforce their right to participate in the Superfund process.”).

105. 42 U.S.C. § 7661d.

gaining power of citizens during the permitting process.¹⁰⁶ It remains to be seen, however, whether Congress will adopt a similar provision when it next re-authorizes RCRA.¹⁰⁷

E. Applying the Same Rules to Government and Private Parties

A basic principle of modern antipollution law is that no entity is above the law. Instead, the laws generally apply equally to every party—whether an individual, a private company, or a government—that engages in regulated conduct.¹⁰⁸ Thus, both Superfund and RCRA—like the Clean Air and Water Acts before them—mandate that federal agencies “be subject to, and comply with” the law “in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity.”¹⁰⁹ Similarly—like other antipollution laws—both Superfund and RCRA apply to “any person” and define “person” to include states and municipalities.¹¹⁰

Although the courts have enforced it inconsistently,¹¹¹ the principle that no entity is above the law has enabled Superfund and RCRA to put a dent in the government-generated pollution problem.¹¹²

106. See Adam Babich, *Citizen Suits: The Teeth in Public Participation*, 25 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,141 (Mar. 1995).

107. EPA has proposed to amend Clean Water Act regulations to require states to afford interested persons the right to challenge approval or denial of state-issued Clean Water Act permits in state courts. Amendment to Requirements for Authorized State Permit Programs Under Section 402 of the Clean Water Act, 60 *Fed. Reg.* 14,588 (proposed rule) (to be codified at 40 *C.F.R.* pt. 123) (1995).

108. There are exceptions, however, notably the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001-11050 (1988 & Supp. V 1993), which does not apply directly to the United States government. Section 329 of the Act limits the Act's coverage to facilities that “are owned or operated [or controlled] by the same person.” 42 U.S.C. § 11049(4). The definition of “person” does not include federal agencies. *Id.* § 11049(7). Therefore, the Act does not cover federal facilities unless they are owned or operated in part by nonfederal parties, e.g., government contractors.

109. 42 U.S.C. § 9620(a)(1) (Superfund); *id.* § 6961 (RCRA); *id.* § 7418(a) (Clean Air Act); 33 U.S.C. § 1323(a) (Clean Water Act).

110. 42 U.S.C. § 9601(21) (Superfund); *id.* § 6903(15) (RCRA); see *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7, 13 (1989) (holding that Congress imposed liability by naming states as “persons” in Superfund and waived the Eleventh Amendment immunity of the states from suit for money damages by private citizens in federal court); *Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (“there is no tradition of immunity for municipal corporations”); *Turner v. EPA*, 848 F. Supp. 711, 718 (S.D. Miss. 1994) (dismissing citizen-suit “claims for monetary relief against the State of Mississippi [which] are barred by the Eleventh Amendment”); *Pennsylvania Env'tl. Defense Found. v. Mazurkiewicz*, 712 F. Supp. 1184, 1187 (M.D. Pa. 1989) (noting that the Eleventh Amendment does not bar a suit against a state official for alleged violations of federal law, even when the state is the real party in interest).

111. See *United States Dep't of Energy v. Ohio*, 112 S. Ct. 1627 (1992).

112. After a decade-long struggle, the State of Colorado recently won a battle to apply RCRA to a federal facility. *Peters et al.*, *supra* note 28, at 10,419.

When this principle is applied to cooperative federalism, no government need be in the position of being the sole regulator of its own conduct (a situation that invites trouble).¹¹³ Moreover, forcing each government to put up with independent oversight can provide a refreshing dose of reality. Thus, for example, before insisting on "gold-plated" cleanups at federal facilities, states must face the question of whether they can afford to meet the same standards at landfills owned and operated by their political subdivisions. And before insisting on extensive cleanups of private Superfund sites, the federal government should be prepared to attain the same standards at federal facilities.¹¹⁴

State sovereignty has been an essential tool in the battle to impose regulatory controls on dangerously contaminated federal facilities.¹¹⁵ Indeed, to date, state sovereignty has proven to be the most effective answer to DOJ's decision to employ its "unitary executive policy" to cripple EPA's ability to police the conduct of federal polluters.¹¹⁶ The unitary-executive policy is premised on the notion that all executive agencies work for the same sovereign. If one agency were to sue another, according to the policy, the executive branch, in essence, would be suing itself, leaving no case of actual controversy to which Article III jurisdiction could attach.¹¹⁷ The practical import of the policy is that the same DOJ lawyers represent both polluting federal agencies and federal enforcers. Thus, absent vigorous enforcement by states and citizens, the activities of federal polluters go largely "unchecked by any parties whose interest are in any real sense adverse to those of the [polluters]."¹¹⁸

113. See *supra* notes 27-31 and accompanying text.

114. See *Environmentalists, States Blast DOE Plan to Break Cleanup Deals*, INSIDE E.P.A., Jan. 13, 1995, at 1.

115. See, e.g., *United States v. New Mexico*, 32 F.3d 494 (10th Cir. 1994); *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994); *New Mexico v. Watkins*, 969 F.2d 1122, 1132-33 (D.C. Cir. 1992); ELR UPDATE, Feb. 28, 1994, at 1 ("A district court issued an order, stipulated to by Sierra Club, DOE, and Colorado, that establishes an enforceable schedule for DOE to submit information associated with a RCRA permit application for radioactive mixed waste units at the Rocky Flats plant near Denver, Colorado.").

116. See U.S. ENVTL. PROTECTION AGENCY, *FEDERAL FACILITIES COMPLIANCE STRATEGY VI-3*, app. H (Nov. 1988) (setting forth DOJ's unitary executive policy in 1987 testimony of F. Henry Habicht); *Maine v. United States Dep't of the Navy*, 702 F. Supp. 322, 338 n.8 (D. Me. 1988) (magistrate's opinion) ("The United States' position is that EPA has no authority to proceed against the federal government."), *vacated on other grounds*, 973 F.2d 1007 (1st Cir. 1992).

117. In reality, of course, administrative agencies do not act as a unitary whole but have disparate missions and interests.

118. *Colorado v. United States Dep't of the Army*, 707 F. Supp. 1562, 1570 (D. Colo. 1989). The court also noted:

Not surprisingly, given the legal theories that the nation's top enforcers have adopted, the federal government's record of compliance with its own laws is one of "flagrant" violation.¹¹⁹ Only the principle that no government is above the law—recently reinforced by Congress in the Federal Facilities Compliance Act¹²⁰—has allowed states and citizen enforcers to gain a toe-hold in the struggle to force the government to obey its own laws.¹²¹

The strength of cooperative federalism—that it forces sovereign regulators to function on overlapping turf, regulate one another, and feel the frustration of dealing with independent oversight—is also a source of stress and volatility. Indeed, after championing the principle of equal treatment under the law for decades,¹²² Congress recently

Since it is the E.P.A.'s job to achieve a clean up as quickly and thoroughly as possible, and since the . . . obvious financial interest [of the Army, the owner of the contaminated site at issue] is to spend as little money and effort as possible on the cleanup, I cannot imagine how one attorney can vigorously and wholeheartedly advocate both positions.

Id.

EPA employs lawyers who are dedicated to enforcing environmental laws against federal polluters. But because DOJ has undercut the legal ability of those lawyers to take independent action, their impact is reduced.

119. *Sierra Club v. United States Dep't of Energy*, 770 F. Supp. 578, 584 (D. Colo. 1991) (finding that DOE's "demonstrated attitude is that it is a governmental agency that can avoid RCRA's mandates indefinitely with impunity" and that "DOE's ongoing disregard for RCRA's linchpin permit process [at Rocky Flats] has been flagrant."); *see also* *Sierra Club v. United States Dep't of Energy*, 734 F. Supp. 946, 947-48 (D. Colo. 1990) ("DOE . . . has been obligated, but has failed, to apply for a RCRA permit [for certain mixed waste operations] at Rocky Flats"). In 1987, Ohio Attorney General Anthony J. Celebrezze, Jr. told Congress that "DOE's attitude toward compliance has been as bad as [that of] the worst private sector violators. . . . [While DOE] now pays lip service to some of the environmental laws, its compliance with those laws falls short of an acceptable standard." GAO PRIORITIES REPORT, *supra* note 29, at 27 (footnote omitted).

120. Pub. L. No. 102-386, 106 Stat. 1505 (1992).

121. *See supra* note 115; *see also, e.g., Sierra Club*, 734 F. Supp. at 946 (granting partial summary judgment to plaintiff and finding that certain materials stored at Rocky Flats are subject to RCRA); *Legal Envtl. Assistance Found. v. Hodel*, 586 F. Supp. 1163 (E.D. Tenn. 1984) (holding RCRA and CWA apply to a federal nuclear weapons plant and granting relief to the plaintiff).

122. *See supra* notes 109-110 and accompanying text. During enactment of the 1977 Clean Water Act amendments, Pub. L. No. 95-217, 91 Stat. 1566, for example, Congress expressed its disapproval of *EPA v. California*, 426 U.S. 200 (1976), which had construed narrowly the Act's previous waiver of immunity. S. REP. NO. 370, 95th Cong., 1st Sess. 67 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4392 (explaining that the Supreme Court has misconstrued the original intent of the 1972 amendments, which was to subject all federal facilities to the provisions of state and local pollution laws). Congress's response was to adopt the broad waiver of the Clean Air Act into the Clean Water Act, waiving immunity as to *any* sanctions. The Supreme Court, however, has declined to give full effect to this language. *See United States Dep't of Energy v. Ohio*, 112 S. Ct. 1627 (1992). The Court found the Clean Water Act mandate that the Government "be liable only for those civil

has taken tentative steps toward eroding it. Recent Superfund reform proposals have included a "cap" on the liability of state and local governmental owners and operators of landfills, and two senators have introduced a bill intended to "serve as a pilot" for exempting federal facilities from federal, state, and local environmental requirements.¹²³ Also, the Unfunded Mandates Reform Act of 1995¹²⁴ tends to elevate

penalties arising under Federal law or imposed by a State . . . court . . . to enforce [its] order or . . . process," 33 U.S.C. § 1323(a), to be obscure, stating:

The question is still what Congress could have meant in using a seemingly expansive phrase like "civil penalties arising under federal law." Perhaps it used it just in case some later amendment might waive the government's immunity from punitive sanctions. Perhaps a drafter mistakenly had somehow been waived already. Perhaps someone was careless. The question has no satisfactory answer.

Id. at 1639. Congress's enactment of the Federal Facilities Compliance Act, *supra* note 120, was a response to this ruling.

123. See Steven M. Jawetz, *The Superfund Reform Act of 1994: Success or Failure Is Within EPA's Sole Discretion*, 24 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,161, 10,165-66 (Apr. 1994) (discussing proposed limitations on municipal liability for response costs under Superfund); *States Propose DOE Review Panel to Study Federal Cleanups*, *INSIDE EPA'S SUPERFUND REPORT*, June 14, 1995, at 3, 4 (discussing the Hanford Land Management Act, S. 871, 104th Cong., 1st Sess. (1995), which Frank Murkowski (R-Alaska) and J. Bennett Johnston (D-La.) introduced to exempt DOE's activities at the Hanford nuclear reservation from environmental laws and from an intergovernmental agreement).

124. S. 1, 104th Cong., 1st Sess. (1995). Section 101 of the Unfunded Mandates Reform Act (UMRA) amends Title IV of the Congressional Budget and Impoundment Control Act of 1974 (CBICA), 2 U.S.C. § 651 (1988). Although Congress presented the Act to the President for signature, UMRA § 101 is, in reality, a mere "exercise of the rulemaking power of the Senate and the House of Representatives, respectively." UMRA § 108(1). Each congressional house may "change such rules (so far as relating to such House) at any time, in the same manner, and to the same extent as in the case of any other rule of each House." *Id.* § 108(2).

As amended by UMRA § 101, CBICA § 424 requires the Congressional Budget Office to prepare statements about public bills reported by Senate or House committees. The Budget Office statements must identify those bills containing intergovernmental mandates and private-sector mandates that would impose direct costs of \$50 million and \$100 million or more, respectively, in the fiscal year of the mandate's effective date or in any one of the four following fiscal years. These threshold amounts are to be adjusted annually for inflation. As amended, CBICA § 425(a) now provides that it "shall not be in order in the Senate or the House of Representatives to consider" bills that lack a Budget Office statement, or that impose direct costs that exceed the threshold for intergovernmental mandates without providing federal funds to pay those costs. CBICA § 425(a).

The Act is largely silent on Senate procedures for the disposition of points of order, but presumably the Senate may waive those points on motion by a majority vote. But under the amended CBICA § 426(a) "[i]t shall not be in order in the House of Representatives to consider a rule or order that waives the application of section 425." *Id.* § 426(a). But, nonetheless, the House may decide to vote on the underlying legislation. CBICA § 426(b)(3) states: "As disposition of points of order under section 425 or [§ 426(a)], the Chair shall put the question of consideration with respect to the proposition that is the subject of the points of order." *Id.* § 426(b)(3). Thus, rather than preventing the House from considering the merits of a bill containing an unfunded mandate, § 426(a) merely shuts off a procedural mechanism that might otherwise have allowed the House to avoid a separate vote on whether to consider the bill notwithstanding the mandate. *Id.* § 426(a).

the importance of state and local governmental compliance costs above private compliance costs.¹²⁵

From its title and political context, one might expect the unfunded mandates law to be about federal attempts to coerce states and local governments into implementing regulatory programs without adequate federal funding.¹²⁶ But, when implemented by mandates—

The UMRA requires that the House Committee on Rules include on a report “a separate item identifying all waivers of points of order relating to Federal mandates.” UMRA § 107. Such waivers may be rare, however, since a decision to consider a bill under CBICA § 426(b)(3), notwithstanding an unfunded mandate, would be a disposition of a point of order rather than a waiver. But CBICA § 426(b)(3) also allows the House to vote to override CBICA § 426(a) and, thus, consider “a rule or order that waives the application of section 425.” These votes, presumably, would be listed as waivers pursuant to UMRA § 107.

As amended, CBICA § 423(e) requires Senate and House committees to include in committee reports “an explicit statement on the extent to which the [accompanying] bill or joint resolution is intended to preempt any State, local, or tribal law, and if so, an explanation of the effect of such preemption.” Although the UMRA contains no provision to enforce CBICA § 423(e), litigants may find that the lack of a statement about preemption in a committee report will constitute powerful evidence that Congress did not intend a provision to preempt state or local law. Indeed, for this reason CBICA § 423(e) may turn out to be the most far-reaching and constructive provision of the UMRA.

UMRA Title II addresses administrative action, requiring, *inter alia*, cost-benefit analyses and analysis of regulatory alternatives when federal mandates may result in governmental or private sector expenditures of \$100 million (adjusted annually for inflation) in any one year. UMRA § 202(a). Agencies that promulgate rules imposing such mandates must consider a reasonable number of regulatory alternatives and select the least costly, most cost-effective, or least burdensome that achieves the rule’s objectives *unless* it would be inconsistent with law for the agencies to do so, or the agencies explain why the least costly, most cost-effective, or least burdensome alternative was not adopted. UMRA § 205(a). UMRA Title IV provides for judicial review of such agency statements. If an agency fails to prepare a statement required by Title II, a court may require the agency to do so. UMRA § 401(a)(2)(b). The agency’s failure “shall not be used as a basis for staying . . . or otherwise affecting such agency rule.” UMRA § 401(a)(3).

Additionally, UMRA §§ 203 and 204 require agencies to plan for enhanced agency consultation with certain state and local governments. UMRA § 204(b) exempts certain intergovernmental meetings from the Federal Advisory Committee Act.

The UMRA does not affect certain categories of legislative and regulatory action. Section 4 of the UMRA generally excludes from the Act’s coverage those laws and regulations that enforce constitutional rights, prohibit discrimination, require compliance with accounting and auditing procedures with respect to grants, provide for emergency relief at the request of state, local, or tribal governments, provide for national security, ratify or implement treaty obligations, qualify as emergency legislation, or relate to the Social Security Act. UMRA § 4.

125. See *supra* note 124.

126. See *The Mandates Bill*, WASH. POST, Mar. 21, 1995, at A16 (praising the unfunded mandates bill, apparently on the mistaken assumption that the bill addresses situations in which “a hard-up Congress” delegates duties to states and local governments via “hand-offs”); see also SENATE COMM. ON ENVIRONMENTAL AND PUBLIC WORKS STAFF REPORT, ANALYSIS OF THE UNFUNDED MANDATES SURVEYS CONDUCTED BY THE U.S. CONFERENCE OF MAYORS AND THE NATIONAL ASSOCIATION OF COUNTIES (1994) (addressing the “gap between the authorization of environmental programs and the amount appropriated to support their implementation”). The plain language of the unfunded mandates bill addresses state and

as opposed to incentives—congressional attempts to “commandee[r] the legislative processes of the States” were illegal before passage of the new law.¹²⁷ Moreover, the substantive provisions of the new legislation do not address the federal government’s practice of using incentives to coerce states and local governments into acting as environmental regulators.¹²⁸ Instead, the law is crafted to discourage enactment of new, unfunded *compliance* obligations applicable to state and local governments that act in the following capacities: (1) as members of the larger regulated community engaged in the same conduct as private companies, *e.g.*, entities that maintain buildings and vehicles, generate air pollution, and own and operate landfills; and (2) as entities that supply goods or services usually provided by governments, *e.g.*, drinking water, although such services could be provided by private companies.

Proponents of unfunded mandates reform generally argued that federal law imposes unreasonable compliance obligations, a favorite example being the obligation to monitor drinking water supplies.¹²⁹ If federal regulations are unreasonable, however, they should be changed for *all* members of the regulated community, not just for governments. Singling out governmental entities for special treatment deprives other members of the regulated community of important allies in arguing for reasonable regulations.¹³⁰ In fact, such laws may increase the compliance burden of private companies, as regulators attempt to achieve environmental goals without imposing costs on governmental polluters.

The results of a system that puts governmental polluters above the law are apparent at Department of Defense and Department of Energy sites in this country, and in even more contaminated sites elsewhere in the world.¹³¹ Aided by Our Federalism, however, United States environmental policy-makers have established a clear trend to-

local governmental compliance costs rather than costs of state implementation, which are incurred pursuant to incentives rather than mandates.

127. See *supra* note 55.

128. The new subsections 421(5) and (7) of CBICA, as added by the UMRA, define “federal intergovernmental mandate” and “federal private sector mandate” to apply primarily to “enforceable dut[ies].” UMRA § 101.

129. See, *e.g.*, 141 CONG. REC. S1305 (daily ed. Jan. 23, 1995) (remarks of Sen. Kempthorne).

130. See *supra* note 42.

131. CLOSING THE CIRCLE, *supra* note 28, at 75-77 (describing nuclear waste problems in other countries, especially Russia); see also William J. Broad, *Nuclear Roulette in Russia: Burying Uncontained Waste*, N.Y. TIMES, Nov. 21, 1994, at A1.

wards independent oversight of all governmental polluters.¹³² Isolated missteps, such as the Unfunded Mandates Reform Act, will not reverse this trend. Instead such legislation is best understood as an unfortunate by-product of an essentially healthy tension between sovereigns.

CONCLUSION

It is tempting to conclude that cooperative federalism in the hazardous waste field has failed. Clearly, Congress and EPA have made fundamental mistakes that have limited the doctrine's utility. Indeed, at one time or another, they have violated each of the five, relatively uncontroversial, principles of cooperative federalism identified in this Article.¹³³ Nonetheless, cooperative federalism has caused states to build the capacity to grapple with problems posed by hazardous waste on a sophisticated level.¹³⁴

Even in the face of EPA's refusal to delegate under Superfund, most states have accepted the challenge of attempting to clean up contaminated property.¹³⁵ The informed comments of state regulators—concerned about the enforceability and effectiveness of their own state programs—have helped shape EPA's development of hazardous waste regulations and Congress's statutory initiatives.¹³⁶ The

132. Federal agencies, however, continue to seek exemptions. For example, the Clinton administration's first Superfund reform proposal would have "overrule[d] *United States v. Colorado*," 990 F.2d 1565 (10th Cir. 1003), *cert. denied*, 114 S. Ct. 922 (1994), allowing EPA to insulate federal sites from state enforcement by listing those sites on the national priorities list. Jawetz, *supra* note 123, at 10,163; *see also Wasted Energy*, WALL ST. J., Mar. 16, 1995, at A22 (reporting that Assistant Secretary of Energy Tom Grumbly believes that forcing DOE to comply with RCRA's minimum aisle space requirements is "mindless").

133. The government has violated principle 1 (provide for state implementation), *see supra* notes 71, 74-76 and accompanying text; principle 2 (set clear standards), *see supra* notes 82-83 and accompanying text; principle 3 (respect state autonomy), *see supra* notes 85, 90-91 and accompanying text; principle 4 (police the process), *see supra* note 99; and principle 5 (apply the same rules to government and private parties), *see supra* notes 116, 123-125 and accompanying text.

134. The federal government has turned repeatedly to former state regulators to fill important federal posts. For example, EPA Administrator Carol Browner and Deputy Administrator Fred Hanson are both former state environmental officials.

135. "The majority of the State programs have authorities and capabilities similar to the Federal Superfund program." ELI 50-STATE STUDY, *supra* note 94, at 7.

136. *See, e.g., Mixture Rule Interim Promulgation*, *supra* note 93, at 7630 (reinstating certain rules on an interim basis in part because "[t]hirty-eight State Attorneys General and many State solid waste management officials have stated that if the rules are allowed to lapse, the regulatory structure would be thrown into chaos"); Notice of Public Meeting on the RCRA Hazardous Waste Identification System, 57 Fed. Reg. 61,376, 61,376 (1992) (noting that EPA withdrew its proposed Hazardous Waste Identification Rule "after review of public comments revealed a variety of concerns expressed by environmental groups, industry, and states over the options presented"); *cf. State Groups Express Concerns with Parts of*

existence of state programs can also serve, at times, to moderate shifts in federal law¹³⁷ and to ease the burden on regulated entities.¹³⁸ Moreover, minimum federal standards, accompanied by federal oversight of state programs, have produced a relatively consistent and powerful body of law.

But it is as a tool against federally generated pollution that cooperative federalism has been most important. Although the battle to subject federal facilities to independent state oversight may be far from won,¹³⁹ it is also far from lost. And, surely, nobody expected it to

House Panel-Approved Clean Water Bill, Daily Env't Rep. (BNA), Mar. 31, 1995, at A-7 (reporting on lobbying efforts by the National Conference of State Legislatures Environment Committee's Chair in opposition to proposed Clean Water Act revisions "that would undermine the states' progress in protecting water quality").

137. For example, when a court recently invalidated certain elements of EPA's definition of hazardous waste, state laws based on the EPA rules were not necessarily affected. See *Mixture Rule Interim Promulgation*, *supra* note 93, at 7630 (noting that "[i]mplementation of RCRA requirements is, in large part, carried out by authorized State hazardous waste management programs, many of which currently have 'mixture' and 'derived-from' rules as a matter of independent State law"). See generally James E. Satterfield, *EPA's Mixture Rule: Why the Fuss?*, 24 Env't. L. Rep. (Env't. L. Inst.) 10,712 (Dec. 1994) (discussing the status of the mixture and derived-from rules).

138. As an environmental lawyer practicing primarily in Colorado from 1984-1992, I found that it was consistently more efficient to work with state regulators than with EPA. When working with state regulators, I could often speak face-to-face with a regulator who would take responsibility for the decision at hand. Thus, I could address his or her concerns directly. In contrast, EPA regional lawyers tended, in my experience, to avoid difficult substantive discussions by citing a need to follow directions from EPA headquarters or other remote decision-makers. Moreover, my experience was that state regulators made decisions *much* more promptly than their federal counterparts. The relative merits of working with state and federal bureaucracies, however, presumably varies from state to state, and from program to program.

139. For example, DOE's management of materials that are regulated solely by the Atomic Energy Act (AEA), 42 U.S.C. §§ 2011-2021, 2022-2286i (1988), is not subject to independent oversight. See 42 U.S.C. § 6903(27) (excluding source, special nuclear, or byproduct material as defined by the AEA from RCRA's definition of "solid waste" and, thus, from RCRA regulation); 10 C.F.R. pt. 962 (the hazardous waste component of radioactive mixed waste is subject to RCRA regulation, but the radioactive component is subject solely to the AEA). See generally Dan W. Reicher, *Nuclear Energy and Weapons*, in SUSTAINABLE ENVIRONMENTAL LAW, *supra* note 9, at 903 ("In a decision that would have serious consequences in the following decade, Congress did not give the [Nuclear Regulatory Commission] any licensing or regulatory authority over defense nuclear activities, leaving [one of DOE's predecessor agencies, the Energy Research and Development Administration] as its own safety watchdog."). See also Babich, *supra* note 31, at 11-12 (noting that "[u]ntil the late 1980s, [DOE] limited the information available to regulators by, literally, blindfolding government inspectors for portions of some visits to weapons production facilities" and that, into the 1990s, DOE "continued to hide key pages of its permit applications from the public by designating them 'unclassified controlled nuclear information'—i.e., secret [under 10 C.F.R. pt. 1017].").

DOE regulates itself and its contractors largely through a series of illegally promulgated and, thus, unenforceable "DOE Orders." See Plaintiff's Sentencing Memorandum, *United States v. Rockwell International Corp.*, Criminal Case No. 92-CR-107, at 111 (D.

be easy to force the world's most powerful sovereign to obey its own laws. The progress we have made to date is powerful testimony to both the framers' wisdom in preserving the sovereignty of the several states and the 91st Congress's good sense in adapting the federalist structure to the problem of environmental protection.¹⁴⁰

In an age when so many of the world's nations are struggling with the effects of pollution from governmental facilities that operate above the law, the United States has been fortunate, indeed, to discover that one of the "happy incidents of the federal system"¹⁴¹ is that it can cause its various governments to begin to regulate each other.

Colo., filed Mar. 26, 1992) ("Failure to follow the legally required rulemaking procedures means DOE's orders and regulations are not enforceable.").

In *CLOSING THE CIRCLE*, *supra* note 28, DOE took an unprecedented step in providing the public with a detailed acknowledgment of the environmental damage it wrought during the Cold War. But even if—as *Closing the Circle* seems to demonstrate—DOE is currently under responsible leadership, it is doubtful that any entity should be trusted to serve as the sole regulator of its own conduct with respect to toxic and radioactive materials. DOE's self-regulation is particularly alarming given the inherently dangerous character of the materials subject to the AEA. See *Panel Weighs External Regulation to Ensure Safety at DOE Facilities*, Daily Env't Rep. (BNA), Apr. 18, 1995, at A-2 (reporting DOE officials' acknowledgements of the need for increased independent oversight).

140. The 91st Congress enacted the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, which began the modern era of environmental cooperative federalism. See *supra* note 60 and accompanying text.

141. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").